SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. .....

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

VS.

POOL MANUFACTURING COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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In the United States Court of Appeals
For the Fifth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER, v. POOL MANUFACTURING COMPANY, RESPONDENT.	12683

Petition for Enforcement of an Order of the National Labor Relations Board—Filed February 17, 1949.

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. (1946 ed.), Supp. I, Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against respondent, Pool Manufacturing Company, Sherman, Texas, and its officers, agents, successors, and assigns. The proceedings resulting in said order are known upon the records of the Board as "In the Matter of Pool Manufacturing Company and United Garment Workers of America Local Union No. 251," and "In the Matter of Pool Manufacturing Company and United Garment Workers of America, A. F. L.," Cases Nos. 16-R-726 and 16-C-1298, respectively.

In support of this petition the Board respectfully shows:

(1) Respondent is a Texas corporation, engaged in business in the State of Texas, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record
2 thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on August 26, 1946, duly stated its findings of fact, conclusions of law, and issued an order directed to the respondent, and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the

National Labor Relations Board hereby orders that the respondent, Pool Manufacturing Company, Sherman, Texas, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Garment Workers of America, affiliated with the American Federation of Labor, as exclusive representative of all the respondent's production employees at its Sherman, Texas plant, including employees in the shipping and cutting departments, and including the boiler room employees and the maintenance machinists, but excluding all main office employees, plant office employees, the shipping clerk, billing clerk, the assistant shipping department supervisor, floorladies and floormen, the piece goods foremen, the janitor, the watchman, the gardener, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action;

(b) In any manner interfering with, restraining, and coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist United Garment Workers of America, affiliated with the A. F. L., or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Garment Workers of America, affiliated with the A. F. of L., as the exclusive representative of the respondent's employees in the unit described in 1-(a) of this Order, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Upon application offer to those employees who went on strike on November 5, 1945, and thereafter, and who have not previously applied for reinstatement, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner provided in the Section of the Intermediate Report attached hereto entitled "The

remedy" and place those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said Section, and thereafter, in said manner, offer them employment as it becomes available;

(c) Make whole the employees specified in paragraph 2 (b) above, for any loss of pay they may suffer by reason of the respondent's refusal, if any, to reinstate them, by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from five (5) days after the date on which he applies for reinstatement to the date of the respondent's offer of reinstatement or placement upon a preferential list, less his net earnings, if any, during said period;

(d) Post at its plant at Sherman, Texas, copies of the notice attached to the Intermediate Report, marked "Appendix A".[1] Copies of said notice to be furnished by the Regional Director for the Sixteenth Region, shall after being signed by the respondent's representative, be posted by the respondent's immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. In addition, copies of said notice shall be mailed by respondent to each if its employees who are presently on strike in the same manner that respondent mailed to such employees its letters of February 1, 1946, and January 18, 1946, mentioned in Section III B of the Intermediate Report. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other materials;

(e) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

(3) On August 26, 1946, the Board's Decision and Order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to respondent's counsel.

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[1] This notice, however, shall be, and it hereby is, amended by striking from the first paragraph thereof the words "RECOMMENDATIONS OF A TRIAL EXAMINER" and substituting in lieu thereof the words "A DECISION AND ORDER."

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this
4 Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, and its officers, agents, successors, and assigns to comply therewith. The Board further prays that this Court, in enforcing said order, shall provide that the aforementioned notice to be posted by respondent, marked "Appendix A," shall specifically recite that the Board's order has been enforced by a decree of this Court so that the introductory clause of the notice shall read as follows: "APPENDIX A, NOTICE TO ALL EMPLOYEES, Pursuant to a decree of the United States Court of Appeals enforcing a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:"

NATIONAL LABOR RELATIONS BOARD
By /s/ A. NORMAN SOMERS
A. Norman Somers
Assistant General Counsel

Dated at Washington, D. C.,
this 9th day of February 1949.

5 APPENDIX A TO PETITION

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right

to self-organization, to form labor organizations, to join or assist UNITED GARMENT WORKERS OF AMERICA, affiliated with the AMERICAN FEDERATION OF LABOR, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this union, or any other labor organization.

WE WILL BARGAIN collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is: all production employees, including employees in the shipping and cutting departments, and including the boiler room employees and the maintenance machinists, but excluding all main office employees, plant office employees, the shipping clerk, the billing clerk, the assistant shipping department supervisor, floor ladies and floormen, the piece goods foremen, the janitor, the gardener and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

WE WILL, upon application, offer reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, to the employees who went on strike on November 5, 1945, and thereafter, and who have not previously applied for reinstatement. We will dismiss, if necessary, any persons hired on or after November 5, 1945, and not in our employ on that date. If thereupon, despite such reduction in force, there is not sufficient employment available for the employees to be offered reinstatement, all available positions will be distributed among such employees without discrimination against any employee because of his union affiliation or activities, following such a system of seniority or other nondiscriminatory practice to such an extent as has heretofore been applied in the conduct of our business. Those employees, if any, remaining after such distribution for whom no employment is immediately available,

will be placed upon a preferential list and offered re-employment to their former or substantially equivalent positions as work becomes available and before other persons are hired for such work, in the order determined among them by such system of seniority or other non-discriminatory practice as we have heretofore followed.

POOL MANUFACTURING COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

6 *Duly sworn to by A. Norman Somers.*
Jurat omitted in printing. (All in italics.)

(SEAL)

7 In the United States Court of Appeals
For the Fifth Circuit

(Title Omitted)

Order to File Petition—Filed February 17, 1949

A petition for the enforcement of an order of the National Labor Relations Board made on August 26, 1946 "IN THE MATTER OF POOL MANUFACTURING COMPANY AND UNITED GARMENT WORKERS OF AMERICA LOCAL UNION NO. 251," and "IN THE MATTER OF POOL MANUFACTURING COMPANY AND UNITED GARMENT WORKERS OF AMERICA, A. F. L." Cases Nos. 16-R-726 and 16-C-1298, N.L.R.B., having been presented to this Court,

IT IS ORDERED that said Petition be filed and the case docketed as of February , 1949, and

IT IS FURTHER ORDERED that upon the filing with the Clerk of a certified copy of a transcript of the proceedings of the National Labor Relations Board in the above entitled matters, the Clerk shall forthwith give notice thereof to the said Respondent.

(Signed) E. R. HOLMES
U. S. Circuit Judge

Date: February 17th, 1949.

N. L. R. B. No. 36
Revised 8-9-41

8 United States of America

Before the National Labor Relations Board
SIXTEENTH REGION

RECEIVED
Sept 4 1943
N. L. R. B.
SIXTEENTH REGION
FORT WORTH

Case No. 16-R-726

Date Filed September 4, 1943

In the Matter of—
POOL MANUFACTURING CO.
(Name of Company)
and
UNITED GARMENT WORKERS OF AMERICA LOCAL UNION NO. 251.
(Name of Petitioner)

PETITION FOR INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES PURSUANT TO SECTION 9(c) OF THE NATIONAL LABOR RELATIONS ACT

1. Name of employer Pool Manufacturing Company.
2. Address So. Montgomery street, Sherman, Texas.
3. General nature of business Manufacturer of Men's clothing.
4. Description of the bargaining unit which petitioner claims is appropriate All production employees including those in the cutting and shipping departments, but excluding all office, clerical and supervisory employees.
5. Approximate number of employees in such unit 360.
6. Approximate total number of employees in plant or plants involved 385.
7. Number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collective bargaining 190.
8. Who is the present bargaining representative of employees? none.
9. Names, addresses, and affiliation of any other known individuals or labor organizations who claim to rep-

resent any of the employees in such bargaining unit none.

Name and address of employees or representatives filing the petition. (If made by a labor organization, give also the full name, local number and affiliation of the organization and the name and official position of the person acting for the organization.)

UNITED GARMENT WORKERS OF AMERICA
LOCAL UNION No. 251
By EMILY JORDAN
Emily Jordan
Int'l Representative
Labor Temple, San Antonio, Texas

Subscribed and sworn to before me this 3rd day of September, 1943 at San Antonio, Texas.

KATHRYN W. FISHBACK
Kathryn W. Fishback
Notary Public, Bexar County
Texas

(SEAL)

N. L. R. B.-236
(Rev. 4-1-43)

9

United States of America
Before the National Labor Relations Board
SIXTEENTH REGION

Case No. 16-R-726

In the Matter of—
POOL MANUFACTURING COMPANY
and
UNITED GARMENT WORKERS OF AMERICA LOCAL UNION No. 251
Petitioner.

NOTICE OF HEARING

The Petitioner, above named, having heretofore filed with the National Labor Relations Board Sixteenth Region, a Petition for Investigation and Certification of Representatives, pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, copy of which Petition is hereto attached, and it appearing to the National Labor Relations Board that a question affecting commerce has arisen concerning the representation of employees described by such Petition,

YOU ARE HEREBY NOTIFIED that pursuant to Section 9 (c) of the Act, on the 7th day of October, 1943, at ten o'clock in the forenoon in the United States Post Office Building in the City of Sherman, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board upon the question of representation affecting commerce which has arisen, at which time and place the parties, above named, will have the right to appear in person or otherwise, and give testimony, and persons or labor organizations desiring to intervene and to participate in the proceeding may petition for leave to do so in accordance with Article III, Section 5, and Article II, Section 19, of the Board's Rules and Regulations.

IN WITNESS WHEREOF, the National Labor Relations Board has caused this, its Notice of Hearing, to be signed by the Regional Director for the Sixteenth Region on this 2nd day of October, 1943.

H. CARNIE RUSSELL
H. Carnie Russell
Acting Regional Director
(SEAL) *National Labor Relations Board*

10 TRIAL EXAMINERS' STATEMENT IN "R" CASES

In relation to the Board's investigation concerning the selection of representatives for the purposes of collective bargaining in this case, it is desired at the outset to make clear the position of the trial examiner. The sole objective of the trial examiner here is to obtain a full and complete factual record upon which the Board itself may discharge its duties under Section 9 of the National Labor Relations Act.

It is the duty of the trial examiner to see that the record is full enough to contain all the material evidence but to limit the testimony and refuse to permit the introduction of evidence which is not material and relevant. His discretion is limited by this duty with which he is charged. Your attention should also be called to the fact that, in this type of case, as distinguished from a case where the employer is charged with the commission of unfair labor practices in violation of the Act, the trial examiner does not render an intermediate report to the parties. The case goes directly to the Board for decision.

In general, the trial examiner will present evidence bearing upon the question of the Board's jurisdiction over the

parties and the subject matter of the investigation, while the representatives of the other parties will be expected (with the assistance of the trial examiner if necessary) to present evidence upon the remaining issues. These issues include a description of the labor organizations involved, facts relating to the question concerning representation which is alleged to have arisen, the limits of the appropriate unit for collective bargaining, and the eligibility of employees for voting in any election which may be ordered. The services of the trial examiner are equally at the disposal of all parties to the proceeding in developing such material evidence.

More specifically the evidence should disclose, as to the labor organizations involved, their identity, time of formation, and general structure, including data as to eligibility of members; with particular reference to the employer here concerned. The nature of the question concerning representation should be shown by proof as to whether conflicting claims as to representation are being made, or whether the employer questions the representative status of any of the parties. Likewise the time when organization began, the department or group of employees affected, the subsequent growth or decline of membership, present claims as to membership, and relations had with the employer, including requests for collective bargaining and the presence or absence of contracts, are all of importance.

In considering the appropriate unit for purposes of collective bargaining, the proof should reveal the physical properties involved, a break-down of the nature of work performed by employees as well as an analysis of the numbers of employees engaged in each type of work. The presence or absence of craft organizations should be established, as well as evidence submitted on the identity or differentiation of employees' problems as to wages, hours or working conditions. The history of bargaining units in the plant or in the industry should be disclosed. Information is also desired as to the date as of which the payroll of eligible voters should be taken, for purposes of election or certification.

These suggestions are of necessity not all-inclusive. They may, however, serve to guide the parties to a full and complete factual presentation in which the trial examiner will, in an entirely neutral capacity, assist. The cooperation of all in order to get these facts as expeditiously as possible is required.

13 M-1166

United States of America
Before the National Labor Relations Board
Sixteenth Region
Case No. 16-R-726
In the Matter of
POOL MANUFACTURING COMPANY
and
UNITED GARMENT WORKERS OF AMERICA, LOCAL UNION No. 251

STATEMENT OF FIELD EXAMINER CONCERNING CLAIMS OF AUTHORIZATION FOR THE PURPOSE OF REPRESENTATION

The undersigned, Field Examiner for the National Labor Relations Board, Sixteenth Region, has investigated the petition filed by United Garment Workers of America, Local Union No. 251.

In connection with the investigation petitioner has submitted to me certain evidence in support of its allegation that petitioner represents 190 employees in the alleged appropriate unit. This evidence consists of:

1. 201 authorization cards in the form set out below:

"AUTHORIZATION

I, the undersigned, hereby apply for membership in and authorize and direct the United Garment Workers of America, affiliated with the American Federation of Labor, to act for me and in my behalf, as sole and exclusive bargaining agent for the purpose of collective bargaining with

_____

and to represent me in all matters before the National Labor Relations Board.

City _____ State _____

Dated This _____ Day Of _____ 19__"

The authorization cards submitted were dated as follows:

August, 1942	1
August, 1943	189
September, 1943	6
No Date	5
Total	201

201 of the 201 signatures affixed to the said authorization cards appear to be genuine original signatures.

179 of the 201 signatures which appear to be genuine original signatures are the names of persons whose names are on the Company's payroll of September 22, 1943.

The Company's payroll of September 22, 1943, contained a total of 352 names. Of this number, 319 are the names of employees within the petitioner's alleged appropriate unit.

H. CARNIE RUSSELL

H. Carnie Russell
Sr. Field Examiner
National Labor Relations Board
16th Region

United States of America
Before the National Labor Relations Board
Sixteenth Region
Case No. 16-R-726
In the Matter
of
POOL MANUFACTURING COMPANY
and
UNITED GARMENT WORKERS OF AMERICA, LOCAL UNION No. 251

ORDER EXTENDING DATE OF HEARING

Pursuant to authority vested in the Regional Director by Article III, Section 3, Rules and Regulations of the National Labor Relations Board, Series 2, as amended, Edwin A. Elliott, Regional Director for the Sixteen Region of the National Labor Relations Board, upon his own motion, after duly considering the circumstances, hereby extends the date of hearing in this matter from October 7, 1943, to October 8, 1943, at the same hour in the County Commissioner's Court Room, County Courthouse, Sherman, Texas.

EDWIN A. ELLIOTT

Edwin A. Elliott
Regional Director
National Labor Relations Board
Sixteenth Region

Dated: October 5, 1943.
(Seal)

NLRB—48a rev.

18 United States of America
Before the National Labor Relations Board
Case No. 16-R-726
In the Matter
of
Pool Manufacturing Company
and
United Garment Workers of America, Local Union
No. 251

Order Designating Trial Examiner

It Is Hereby Ordered that H. Carnie Russell act as Trial Examiner in the above case and perform all the duties and exercise all the powers granted to Trial Examiners under Article III, Section 5 of the Rules and Regulations—Series 2, as amended, of the National Labor Relations Board.

Dated, Washington, D. C., October 7, 1943.

Frank Bloom
Frank Bloom
Chief Trial Examiner

(Seal)

19 National Labor Relations Board
Washington, D. C.
Case No. 16-R-726
In the Matter
of
Pool Manufacturing Company
and
United Garment Workers of America, Local Union #251

Motion for Exclusion on Behalf of the United Garment Workers of America, Local Union No. 251

The Union respectfully petitions the National Labor Relations Board that the request of the Pool Manufacturing Company of Sherman, Grayson County, Texas, in the above numbered case, for the inclusion of office, clerical, foremen, floorladies, foreladies, janitors, watchmen, guards, horticulturist, boiler room employee, supervisors and supervisory employees, to participate in an election, if and when ordered by the Board for the purpose of determining the proper bargaining unit of the Union, be denied for the reasons herein specified.

1. Office and Clerical Workers are excluded from the petition because of the fact that office and clerical workers of the company belong to a separate unit and are separate and apart from the production department and in that capacity are in possession of the company's records and as such are considered confidential employees, and for the fact that they operate office equipment instead of production machinery, and for this reason the Union petitions that all office and clerical employees be excluded from participating in an election to determine the bargaining unit for the production, cutting and shipping department employes.

2. Foremen employed by the company are supervisory employees, with authority to dictate the policy of the company and charged with the responsibility to see that the policy and instructions issued by the management are adhered to and that the orders of the management are fulfilled. Keep records of employees ability and the records so submitted by the foremen serve as recommendations to the management as to the ability and qualifications of individual employees and upon such recommendations rests the ability and qualifications of employees with reference to permanent employment and classifications, and for this reason the foremen should be excluded from the bargaining unit of production, cutting room and shipping department employees.

3. Foreladies and Floorladies in the production, inspections and pressing department are charged with the responsibility of directing the work in their respective departments, by ordering the employees from one job to another and act as instructors to the individual employees, and upon their recommendations depend the employment of individual workers as to their qualifications; are vested with the power to recomend promotion, demotions, permanent employment or discharge; they keep the record on each employee in their respective departments and upon the records thus kept and submitted to the supervisor depends the permanent employment of all employees in their respective departments, and for these reasons, Mrs. J. R. McCollough, Mrs. D. C. Tipton, Mrs. Myrtle Ratliff, Mrs. Pearl Reese, and Mrs. Gladys Foreman, carried on the records of the company as foreladies or floorladies, ought to be excluded from the bargaining unit of production employees.

4. Janitors work is combined with that of watchman. The work of the janitor is done outside of production

hours and after all employees in the production department have quit work for the day, and as their work is not of a production nature, all employees listed as janitors should be excluded from the bargaining unit of production employees.

5. Watchmen of the company are charged with the responsibility of guarding company property and are commissioned peace officers with the right to use firearms for the protection of company property if such an act should become necessary. The employment hours of watchmen is during the night, and their work is in no wise productive, hence all watchmen should be excluded from the bargaining unit of production employees.

6. Guards employed by the company are charged with the responsibility of guarding company property and as they are commissioned peace officers and in no wise productive employees it is very respectfully petitioned that guards of the company be excluded from the bargaining unit of the production department.

7. Horticulturist employed by the company is charged with the responsibility of the upkeep of the grounds and garden of the company adjacent to the factory and is in no wise employed as a production employee, and for that reason should be excluded from the bargaining unit for production employees.

8. Boiler room employees of the company is hired for the express purpose of watching and supervising the boiler and his chief responsibility is to see that the boiler is in working order and as such work is in no way productive, boiler room employee should be excluded from the bargaining unit for production employees.

9. Supervisors and supervisory employees of the company are those employees employed by the company to supervise the production employees with authority to either hire and discharge, and or recommend the hire and discharge, promotions and demotions of individual workers in the production departments and act in behalf of the management in seeing to it that the policy and instructions of the management are carried out; are consulted by the management and officials of the company with reference to ability and qualifications of production employees, and for that reason Mr. Tuttle, R. M. Tucker, John Ricketts, Emmet Ratliff, Leslie McClure, Jack Shaw, Carl Zimmerman, Mr. Buchanan, Mr. Stockdale, Bill Hodges, classed as supervisors by the company, should be excluded from the bargaining unit of the production employees.

22 Some of the supervisors are stockholders in the company and are classed as Junior Executives. Emmet Ratliff, supervisor in the cutting department is a stockholder in the company. Mrs. Myrtle Ratliff, floorlady in the production department is the wife of Mr. Emmet Ratliff, a stockholder in the company.

For the reasons herein stated, the United Garment Workers of America, Local Union No. 251, respectfully petitions your honorable board for the exclusion of the above mentioned employees and classifications from the bargaining unit and respectfully requests that the Company's motion for inclusion of these employees be denied.

Respectfully submitted,

UNITED GARMENT WORKERS OF AMERICA
LOCAL UNION NO. 251-(A. F. OF L.)

By EMILY JORDAN
Emily Jordan
International Representative
United Garment Workers of America

EJ:
OE #21516

23 United States of America
Before the National Labor Relations Board
Case No. 16-R-726
In the Matter of
POOL MANUFACTURING COMPANY
and
UNITED GARMENT WORKERS OF AMERICA
LOCAL UNION NO. 251

Mr. C. T. Freeman, of Sherman, Tex., and *Mr. Sidney L. Samuels*, of Ft. Worth, Tex., for the Company.

Mr A. F. Cadina and *Mrs. Emily Jordan*, of San Antonio, Tex., for the Union.

Miss Frances Lopinsky, of counsel to the Board.

DECISION AND DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon a petition duly filed by United Garment Workers of America, Local Union No. 251, herein called the Union, alleging that a question affecting commerce had arisen con-

cerning the representation of employees of Pool Manufacturing Company, Sherman, Texas, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before H. Carrie Russell, Trial Examiner. Said hearing was held at Sherman, Texas, on October 8, 1943. The Company and the Union appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded an opportunity to file briefs with the Board.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the Company

Pool Manufacturing Company, a Texas corporation, is engaged in the manufacture of men's shirts, work, dress, and military trousers, one-piece work suits, sportswear, overalls, and allied garments at its plant in Grayson County, near Sherman, Texas. During the calendar year 1942, the Company purchased in States other than the State of Texas, cotton piece goods, threads, buttons, and other related materials and items of the approximate value of
$509,575, which amounts to approximately 85 per-
24 cent of its purchases for that year. During the same period the Company's sales to customers in States other than Texas amounted to the approximate value of $704,633 or approximately 63.8 percent of its entire sales for that year.

We find that the Company is engaged in commerce within the meaning of the National Labor Relations Act.

II. The organization involved

United Garment Workers of America, Local Union No. 251 affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the Company.

III. The question concerning representation

The Company has refused to grant recognition to the Union as the exclusive bargaining representative of its employees until the Union has been certified by the Board in an appropriate unit.

A statement of the Field Examiner, introduced into evidence at the hearing, indicates that the Union represents a substantial number of employees in the unit hereinafter found appropriate.[1]

We find that a question affecting commerce has arisen concerning the representation of employees of the Company, the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. The appropriate unit

The Union and the Company agree that an appropriate unit should consist of all non-supervisory production employees of the Company, at its Sherman, Texas, plant, including those in the cutting and shipping departments. The Company contends that this unit description covers all of the Company's employees except its plant superintendent and its six junior executives. The Union, on the other hand, contends that the description would exclude certain categories of employees hereinafter discussed.

1. *Main office employees.*[2] The employees who work in the main office of the plant are physically separated from the production room. Although their work is necessary to the operation of the plant, it is completely clerical in nature. These employees are not "production employees" in the usual sense and we shall, therefore, exclude them from the unit.

2. *Plant office employees.* The plant office employees are separated from the production room by a glass partition. They are stenographers and clerks. The former do ordinary stenographic work; the latter make up size tickets and work coupons, keep personnel and production records. Their work bears the same relation to production as that of the main office employees, for which reasons we shall exclude them from the unit.

---

[1] The Field Examiner reported that the Union submitted 201 authorization cards, all of which bore apparently genuine original signatures; that the names of 179 persons appearing on the cards were listed on the Company's pay roll of September 22, 1943, which contained the names of 319 employees in the appropriate unit; that the cards were dated 1 in August 1942; 195 in August and September 1943, 5 undated.

[2] Credit Manager, stenographer, file clerk, statements and invoice checking clerk, bookkeeper and cashier, sales accounting and general bookkeeper perpetual inventory bookkeeper, pay roll bookkeeper, and accounts receivable bookkeeper.

3. *Shipping department employees.* The Union would include within the unit all shipping department employees including the shipping clerk, but excluding the billing clerk and the assistant shipping department supervisor. As the duties of these two employees, as well also as those of the shipping clerk, are more clerical than productive, we shall exclude the shipping clerk, the billing clerk, and the assistant shipping department supervisor from the unit.

4. *Floorladies and Floormen:* The floorladies and floormen are the direct supervisors of groups of machine operators. All directions to the operators come through them. They assign work, instruct newcomers, and keep records on the performance of the employees under their supervision. Although they have no authority to effect changes in the status of employees either directly or by recommendations, their records are used as a basis for making such changes, and they are regarded by the persons working under them as representatives of management. We find that floorladies and floormen are supervisory employees and shall exclude them from the unit.

5. *The piece goods foreman* is in charge of the piece goods department which is a stockroom for incoming stock. He checks in the stock, makes the proper records, and checks it out to the operators. He reports both to the plant superintendent and to the purchasing agent. Although the piece goods foreman has no authority to effect changes in the status of employees, in our opinion he is not a "non-supervisory production employee." Because of his responsibility for the operation of his department, the discretion which he may use therein, and the nature of his duties, we shall exclude him from the unit.

6. *Janitor, watchmen, gardener.* There are three watchmen, two of them watchmen-sweepers, the third a full-time watchman. They and the janitor come on duty after regular working hours. The gardener is in charge of keeping the outside premises in order. These three categories of workmen are clearly plant maintenance employees whose work affects production only indirectly. As they do not fall within the meaning of the term "production employees" we shall exclude them from the agreed unit.

7. *The boiler room employee* is in charge of taking care of the boiler. He also dyes buttons, threads, and materials. Since he is, in part, a production employee, we shall include him in the unit.

We find that all production employees of the Company at its Sherman, Texas plant, including employees in the shipping and cutting departments, and including the boiler room employee and the maintenance machinists,[3] but excluding all main office employees, plant office employees, the shipping clerk, the billing clerk, the assistant shipping department supervisor, floorladies and floormen, the piece goods foreman, the janitor, the watchmen, the gardener, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

[3] Both parties agreed that the maintenance machinists should be included.

V. The Determination of Representatives

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of the Direction of Election herein, subject to the limitations and additions set forth in the direction.

26 Direction of Election

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

Directed that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with Pool Manufacturing Company, Sherman, Texas, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Sixteenth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Sections 10 and 11, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including

employees in the armed forces of the United States who present themselves in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, to determine whether or not they desire to be represented by United Garment Workers of America, Local Union No. 251 affiliated with the American Federation of Labor, for the purposes of collective bargaining.

Signed at Washington, D. C., this 15 day of November, 1943.

HARRY A. MILLIS
Chairman

GERARD D. REILLY
Member

JOHN M. HOUSTON
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

29 NLRB 216 (10-12-43)

United States of America
National Labor Relations Board
File in Informal File
TALLY OF BALLOTS

Employer Pool Manufacturing Company (Board-Ordered) Case No. 16-R-726

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated below, were as follows:

Approximate number of eligible voters	310
Valid votes counted	282
Votes cast for United Garment Workers of America, Local Union No. 251, affiliated with the American Federation of Labor	222
Votes cast against participating union	60
Challenged ballots	1
Void ballots	1

A majority of the 282 valid votes and challenged ballots, which together are the basis for a majority, have been cast for United Garment Workers of America, Local 251, A. F. of L.

Challenges are (not) sufficient in number to affect the results of the election.

For the
Regional Director C. Woodrow Greene, Date December 7, 1943.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Pool Manufacturing Company

W. D. Hodges
Joe Lorene Dayton

For United Garment Workers of America, Local 251, affiliated with the American Federation of Labor

Grace Quiley
Mary C. King

379-D

United States of America

Before the National Labor Relations Board

Case No. 16-R-726

In the Matter
of
Pool Manufacturing Company
and
United Garment Workers of America, Local Union No. 251

Certification of Representatives—Dec. 17, 1943

On December 7, 1943, pursuant to the Decision and Direction of Election issued by the Board herein on November 15, 1943,[1] an election by secret ballot was conducted under the direction and supervision of the Regional Director for the Sixteenth Region (Fort Worth, Texas). Upon the conclusion of the election, a Tally of Ballots was furnished the parties in accordance with the Rules and Regulations of the Board. No objections were filed by any of the parties within the time provided therefor.

The tally shows that of the approximately 310 eligible voters, 282 cast valid votes, of which 222 were for United

[1] 53 N. L. R. B. No. 115

Garment Workers of America, Local Union No. 251, affiliated with the American Federation of Labor, and 60 against. One ballot was challenged, but since it cannot affect the results of the election, we find it unnecessary to make any determination with respect thereto.

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Sections 9 and 10, of National Labor Relations Board Rules and Regulations—Series 3,

IT IS HEREBY CERTIFIED that (United Garment Workers of America, Local Union No. 251, affiliated with the American Federation of Labor), has been designated and selected by a majority of all production employees of Pool Manufacturing Company, at its Sherman, Texas, plant, including employees in the shipping and cutting departments, and including the boiler room employee and the maintenance machinists, but excluding all main office employees, plant office employees, the shipping clerk, the billing clerk, the assistant shipping department supervisor, floorladies and floormen, the piece goods foreman, the janitor, the watchmen, the gardener, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, the said organization is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Washington, D. C., this 17 day of December, 1943.

HARRY A. MILLIS
Chairman

GERARD D. REILLY
Member

JOHN M. HOUSTON
Member

NATIONAL LABOR RELATIONS BOARD

33 United States of America

Before the National Labor Relations Board

Sixteenth Region

Case No. 16-C-1298

In the Matter of

POOL MANUFACTURING COMPANY

and

UNITED GARMENT WORKERS OF AMERICA, A. F. OF L.

Complaint

It having been charged by United Garment Workers of America, A. F. of L. that Pool Manufacturing Company hereinafter referred to as respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act, the National Labor Relations Board, hereinafter referred to as the Board, by the Regional Director for the Sixteenth Region as agent for the Board, designated by the Board's Rules and Regulations, Series 3, as amended, Article IV, Section 1, hereby issues its complaint and alleges as follows:

1. Respondent is and has been at all times herein mentioned a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business in the City of Sherman, County of Grayson and State of Texas, and is now and has been at all the times herein mentioned continuously engaged at said place of business, hereinafter referred to as the plant, in the manufacture, sale and distribution of garments and related products.

2. Respondent in the course and conduct of its business causes and has continuously caused a substantial amount of materials used in the manufacture, sale and distribution of said garments and related products to be pur-

34 chased, delivered and transported in interstate commerce from and through the states of the United States other than the State of Texas to its plant and causes and has continuously caused a substantial part of the products manufactured, sold and distributed by it as a part of its business to be supplied, delivered and transported in interstate commerce to and through the states of the United States other than the State of Texas from its plant.

3. United Garment Workers of America, A. F. of L. hereinafter referred to as the Union, is a labor organiza-

tion within the meaning of Section 2, subdivision (5), of the Act.

4. In order to insure to the employees of respondent the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of the Act, all production employees, including employees in the shipping and cutting departments, and including the boiler room employees and the maintenance machinists of the respondent employed at its plant, exclusive of all main office employees, shipping clerk, billing clerk, shipping department supervisor, floorladies, floormen, piece goods foreman, janitor, watchman, gardener and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subdivision (b), of the Act.

5. On or about December 7, 1943, a majority of the employees of respondent in the unit described above in paragraph 4, designated or selected the Union as their representative for the purposes of collective bargaining with respondent and at all times since that date the Union has been the representative for the purposes of collective bargaining of a majority of the employees in said unit and, by virtue of Section 9, subdivision (a), of the Act, has been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

6. On or about December 17, 1943, the Union requested respondent to bargain collectively in respect to rates of pay, wages, hours of employment or other conditions of employment with the Union as the exclusive representative of all the employees of respondent in the unit described above in paragraph 4.

7. On or about September 26, 1945 and prior thereto, and at all times thereafter, respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive representative of all the employees in the unit described above in paragraph 4.

8. Respondent, through its officers, agents and employees from on or about September 26, 1945, and prior thereto, and continuously to date, entered upon a plan and scheme and course of conduct having the design, purpose and objective of interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

9. Respondent in furtherance of, pursuant to, and to effect the purposes and objectives of the plan and scheme

and course of conduct described above in paragraph 8 did wholly fail and refuse to furnish the Union upon request with full information and data concerning earnings and production records of the employees described above in paragraph 4, which was material to the Union's consideration in the exercise of its function as the exclusive collective bargaining representative of said employees; wholly fail and refuse to discuss with the Union any terms or condition of employment, provisions for union security or a written contract, except with respect to wages or production operators; wholly fail and refuse to bargain collectively in good faith with the Union upon request concerning wages of said production operators; wholly fail and refuse to bargain collectively with the Union upon request concerning wages of said production operators after October 23, 1945; make misleading representations to the said employees concerning the true status of the Unions' attempted collective bargaining negotiations; wholly fail and refuse, prior to the strike described below in paragraphs 10 and 11, to meet seasonably with the Union upon request; wholly fail and refuse, subsequent to the strike described below in paragraphs 10 and 11, to meet, confer or collectively bargain with said employees' representatives of their own choice upon request, except that it did meet with said representatives on November 21 and 27, 1945; make misleading statements to the effect that some of said em-
36 ployees engaged in a "slow down" of production; attempt to negotiate directly with the said employees concerning the terms and conditions of employment outside the presence of the Union representatives selected by said employees; address a letter to said employees falsely representing, in substance, that the duration of the strike was the fault of and caused by the Union and that violence and intimidation were being practiced by the Union on the picket line; address letters to former employees (not strikers) asserting that permanent employment was available to them and without representing that strike conditions prevailed at the plant; publish a copy of a letter the respondent had written to the United States Conciliation Service under a misleading statement that the respondent had offered the said production operators a 21¾ per cent wage increase and without representing that the increase was based on a substantial increase in production requirements of said operators, and assert in the letter, in substance, that the employees should end the strike before collective

bargaining could be commenced; published an advertisement in the local press representing that permanent positions were available at the plant and without representing that strike conditions prevailed at the plant; address a letter to the said striking employees representing that permanent replacements were being hired for their positions; cause supervisory employees to contact said employees directly and to urge the striking employees to return to work; induce employees who had returned to work to contact said striking employees and to urge them likewise to return to work, using respondent's telephone and other facilities therefor; induce employees to withdraw from the Union, using respondent's stationery and other facilities therefore; interrogate said employees concerning their Union affiliation; urge, persuade, threaten and warn its employees from assisting, becoming members of or remaining members of the Union; keep under surveillance activities of the Union and other concerted activities of its employees for the purpose of self-organization or improvement of working conditions; villify, disparage, ridicule, and express disapproval of the Union and its officials and its attempts to bargain collectively, represent, in sub-
37 stance, to said employees that the strike described below in paragraphs 10 and 11 was futile, stale and a permanent labor dispute; represent to said employees that the plant had been permanently restaffed; unilaterally offer and put into effect a wage increase and other beneficial terms and conditions of employment more favorable than had been in effect at the time the Union attempted to bargain collectively with the respondent, and more favorable than the respondent had ever offered the Union; and commit sundry and divers other acts similar to the aforementioned acts.

10. On or about November 5, 1945 the employees of respondent employed at its plant ceased work concertedly and went on strike.

11. The strike described above in paragraph 10 was caused by and at all times herein mentioned has been prolonged by the unfair labor practices of respondent described above in paragraphs 6, 7, 8 and 9.

12. Respondent has threatened and proposes to continue the commission of the Acts described above in paragraphs 6, 7, 8 and 9.

13. By the acts described above in paragraphs 6 and 7, respondent did engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8, subdivision (5), of the Act.

14. By the acts described above in paragraphs 6, 7, 8, 9 and 12, and by each of said acts, respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8, subdivision (1), of the Act.

15. The activities of respondent, described above in paragraphs 6, 7, 8, 9 and 12, occurring in connection with the operations of respondent, described above in paragraphs 1 and 2 have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

16. The acts of respondent, described above, con-
38 stitute unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (5), and Section 2, subdivisions (6) and (7), of the Act.

WHEREFORE, the National Labor Relations Board on the 10th day of April, 1946 issues its complaint against Pool Manufacturing Company, respondent herein.

39 NLRB 501
(12-1-44)

United States of America
Before The National Labor Relations Board
16th Region

(Title Omitted)

Charge—Dec. 20, 1945

Pursuant to Section 10 (*b*) of the National Labor Relations Act, the undersigned hereby charges that Pool Manu-
(Full
facturing Company Frank G. Frau, President at Sherman,
name of company) (Address of
Texas, employing 200 workers in garment manufacturing
establishment) (Number) (Type of business)
has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that on or about October 16, 1945, and at various times thereafter, it, by its officers, agents and employees, refused to bargain collectively with the authorized agents of the United Garment Workers of America, chosen by a majority of its employees at its Sherman plant, to rep-

resent them for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

By the acts set forth in the paragraph above, and by other acts and conduct, it by its officers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

UNITED GARMENT WORKERS OF AMERICA
/s/ EMILY JORDAN
Int. Rep.

Subscribed and sworn to before me this 20th day of Dec., 1945 at Fort Worth, Texas.

/s/ H. CARNIE RUSSELL
Field Examiner
N. L. R. B.

40 NLRB 234
(6-2-42)

United States of America
Before the National Labor Relations Board
Sixteenth Region
Case No. 16-C-1298
(Title Omitted)

Notice of Hearing—April 10, 1946

PLEASE TAKE NOTICE that on the 29th day of April, 1946, at ten o'clock in the forenoon in the United States Post Office Building in the City of Sherman, Texas, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the undersigned Regional Director, acting in this mat-

ter as agent of the National Labor Relations Board, an answer to the said Complaint within ten (10) days from the service thereof.

PLEASE TAKE NOTICE that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

IN WITNESS WHEREOF the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Regional Director for the Sixteenth Region on this tenth day of April, 1946.

EDWIN A. ELLIOTT
Edwin A. Elliott
Regional Director
National Labor Relations Board

47 United States of America
Before the National Labor Relations Board
(Title Omitted)

Order Transferring Case to the National Labor Relations Board—June 28, 1946

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington, D. C.,

IT IS HEREBY ORDERED, pursuant to Article II, Section 32, of National Labor Relations Board Rules and Regulations—Series 3, as amended, that Case No. 16-C-1298 be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., June 28, 1946.

By direction of the Board:

/s/ EDWARD M. ROCHE
Acting Chief, Order Section

49 United States of America

Before the National Labor Relations Board

Case No. 16-C-1298

In the Matter

of

POOL MANUFACTURING COMPANY

and

UNITED GARMENT WORKERS OF AMERICA, A. F. L.

Mr. Louis R. Mercado for the Board.

Mr. John M. Scott, of Ft. Worth, Tex. and *Messrs. Freeman, Wolfe*, and *Keith*, by *Sam D. Wolfe* and *David H. Brown*, of Sherman, Tex., for the respondent.

Miss Emily Jordan and *Mr. A. F. Cadena*, of San Antonio, Tex., for the Union.

Mr. James Zett, of counsel to the Board.

Decision and Order—Aug. 26, 1946

On June 25, 1946, Trial Examiner Joseph C. Wells issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that the respondent cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. No exceptions to the Intermediate Report were thereafter filed with the Board.

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Pool Manufacturing Company, Sherman, Texas, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Garment Workers of America, affiliated with the American Federation of Labor, as exclusive representative of all the respondent's production employees at its Sherman, Texas plant, including employees in the shipping and cutting departments, and including the boiler room employees and the maintenance machinists, but excluding all main office

employees, plant office employees, the shipping clerk, billing clerk, the assistant shipping department supervisor, floorladies and floormen, the piece goods foreman, the janitor, the watchman, the gardener, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action;

(b) In any manner interfering with, restraining, and coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist United Garment Workers of America, affiliated with the A. F. L., or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Garment Workers of America, affiliated with the A. F. of L., as the exclusive representative of the respondent's employees in the unit described in 1 (a) of this Order, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Upon application offer to those employees who went on strike on November 5, 1945, and thereafter, and who have not previously applied for reinstatement, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner provided in the Section of the Intermediate Report attached hereto entitled "The remedy" and place those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said Section, and thereafter, in said manner, offer them employment as it becomes available;

(c) Make whole the employees specified in paragraph 2 (b) above, for any loss of pay they may suffer by reason of the respondent's refusal, if any, to reinstate them, by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from five (5) days after the date on which he applies for reinstatement to the date of the respondent's offer of reinstatement or placement upon a preferential list, less his net earnings, if any, during said period;

(d) Post at its plant at Sherman, Texas, copies of the notice attached to the Intermediate Report, marked "Ap-

pendix A"[1] Copies of said notice to be furnished by the Regional Director for the Sixteenth Region, shall after being signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. In addition, copies of said notice shall be mailed by respondent to each of its employees who are presently on strike in the same manner that respondent mailed to such employees its letters of February 1, 1946, and January 18, 1946, mentioned in Section III B of the Intermediate Report. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material;

51 (c) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 26 day of August, 1946.

GERARD D. REILLY
Member

JOHN M. HOUSTON
Member

(seal) NATIONAL LABOR RELATIONS BOARD

52 United States of America

Before the National Labor Relations Board
Trial Examiner Division
Washington, D. C.

(Title Omitted)

Mr. Louis R. Mercado, for the Board.
Mr. John M. Scott, of Ft. Worth, Texas, and *Messrs. Freeman, Wolfe and Keith*, by *Sam D. Wolfe* and *David H. Brown*, of Sherman, Texas, for the respondent.
Miss Emily Jordan and *Mr. A. F. Cadena*, of San Antonio, Texas, for the Union.

Intermediate Report of Trial Examiner—June 25, 1946

STATEMENT OF THE CASE

Upon a charge duly filed on December 20, 1945, by United Garment Workers of America, affiliated with the

[1] This notice, however, shall be, and it hereby is, amended by striking from the first paragraph thereof the words "RECOMMENDATIONS OF A TRIAL EXAMINER" and substituting in lieu thereof the word "A DECISION AND ORDER."

American Federation of Labor, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Sixteenth Region (Ft. Worth, Texas), issued its complaint dated April 10, 1946, against Pool Manufacturing Company, herein called the respondent, alleging that the respondent has engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and the charge, together with notice of hearing thereon, were duly served upon the respondent and the Union.

With respect to unfair labor practices, the complaint alleges in substance that the respondent: on or about September 26, 1945, and continuously thereafter until the date of the complaint, refused to bargain collectively in good faith with the Union as the exclusive representative of its employees in an appropriate unit, although the Union has been the selected and designated representative of such employees since on or about December 17, 1943, by (1) refusing upon request by the Union to furnish to the Union full information and data concerning earning and production records of its employees within the appropriate bargaining unit; (2) making misleading representations to its employees in the appropriate unit concerning the status of bargaining negotiations between it and the Union; (3) refusing to meet seasonably with Union pursuant to the latter's request; (4) limiting negotiations between it and the Union to the discussion of wages for production operators and refusing to discuss with the Union any other terms or conditions of employment or provisions of union security; (5) attempting to negotiate directly and unilaterally with its employees in the appropriate unit; and (6) following a strike of employees in the appropriate unit on November 5, 1945, stating that effective bargaining could thereafter be accomplished only after a termination of the strike. The Complaint further
53 alleges in substance that the respondent had engaged in unfair labor practices within the meaning of Section 8 (1) of the Act by (1) urging striking employees to return to work; (2) inducing employees to withdraw from the Union; (3) threatening and warning its employees from assisting, becoming or remaining members of the Union; (4) interrogating employees concerning

their union affiliation; and (5) keeping under surveillance the union activities of its employees.

The respondent failed to file an answer to the complaint.

Pursuant to notice, a hearing was held in Sherman, Texas, on April 29, and 30, May 2, 20, and 21, 1946, before the undersigned Joseph C. Wells, Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union appeared and participated in the hearing. The Board and the respondent were represented by counsel and the Union by two of its lay representatives. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the taking of evidence presented by the Board, counsel for the respondent moved to dismiss the complaint for lack of proof. The undersigned denied the motion. Counsel for the Board then moved to amend the complaint with respect to minor matters such as the correction of misspelled names. The motion was granted. Thereafter the undersigned offered to hear oral argument by the parties. Counsel for the Board and the representatives of the Union declined to present any argument. Counsel for the respondent, however, orally presented a summation of the respondent's position in the case, and counsel for the Board replied briefly. Both statements are part of the stenographic report of the hearing. The parties were then advised that they might file briefs with the undersigned on or before June 3, 1946. No brief has been received from any of the parties.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. THE BUSINESS OF THE RESPONDENT

Pool Manufacturing Company, a Texas corporation, having its principal offices and only plant in Sherman, Texas, is engaged in the manufacture, sale and distribution of men's work clothing. During the year 1945, its purchase of raw materials had a total value of about $600,000, of which materials valued at approximately $400,000 were shipped to it from points outside the State of Texas. During the same period, its finished products totaled in excess of $1,000,000 in value, of which approximately 50 percent was shipped from its plant to points outside the State.

The respondent conceded at the hearing that it is engaged in commerce within the meaning of the Act.

II. The organization involved

United Garment Workers of America, affiliated with the American Federation of Labor, is a labor organization admitting to membership employees of the respondent.

III. The unfair labor practices

Background

Following its certification by the Board on December 17, 1943, as the majority representative of respondent's
54 employees in a unit found by the Board to be appropriate,[1] the Union entered into a written contract with the respondent expressing an agreement between the parties resultant from collective bargaining and a proceeding before the National War Labor Board. The contract was executed November 17, 1944, and by its terms terminated November 1, 1945. The contract incorporated a plan known as the "Norris Unit Pay Plan" which prescribed an assembly-line production system slightly different than that utilized under the "piece work rate" system which had been in effect prior to the installation of the Norris unit system.

The 1944 contract did not produce the harmony between the parties which doubtlessly each had anticipated. The Union contended that the inherent character of the Norris system and/or its application by the respondent resulted in a reduction of wages rather than the increase which had been contemplated by the contract. The respondent, on the other hand, contended that the Norris unit system, given proper employee cooperation, would accomplish both greater production efficiency and increased pay for its employees. Neither attempts at collective bargaining nor the Union's utilization of the processes of the National War Labor Board during the period covered by the contract satisfactorily resolved the issue. Indeed, as indicated by subsequent events, it appears that these efforts merely served to widen and crystallize the breach between the parties as the 1944 contract drew to a close. In any event, the dissatisfaction remained and supplied the keynote for the occurrences which afford the basis for the complaint herein.

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[1] Matter of Pool Manufacturing Company, 53 N. L. R. B. 648.

A. *The refusal to bargain collectively with the Union*

1. Sequence of events

On September 26, 1945, about 5 weeks prior to the expiration date of the 1944 contract mentioned above, the Union by letter advised Frank G. Trau, the respondent's president, that on or about the 10th of October 1945, it would be prepared to negotiate for certain changes in the then existing contract. In reply, Trau orally advised Vesta Haizlip, president of the Union, that he would be unable to meet with the Union's representatives until after October 15, 1945, and arrangements were made to meet on October 16, 1945. On the latter date, Emily Jordon, International Representative of the Union, and a committee composed of Haizlip, Alberta Biggerstaff, Cleo Brown, Effie Nelson, and Lillian McSpedden met with Trau and W. T. Tuttle, respondent's secretary-treasurer at the plant office. The Union submitted to Trau and Tuttle a proposed written contract covering the following subjects:

Recognition of the Union
Union security (Union Shop)
Union security (Check off of union dues, fines and assessments)
Hours of work
Vacations
Seniority
Shop committee
Adjustment of Disputes
Arbitration
Wages
Show up time pay
Duration of agreement

Trau read the Union's proposal for a new contract, asserted that the respondent would "never agree" to the union shop provision, inquired in a jocular manner as to whether the respondent would receive a commission for checking off dues, and commented finally, "I see you girls didn't ask for any more than fifty cents [minimum hourly wage] and that's what's hurting us is, the wage minimum is breaking us." After some discussion, Trau offered the bargaining committee a 10 percent increase in the value of the unit. The committee explained that the Union proposal on wages contemplated a return by respondent to the piece work rate system, that the installation of the Norris unit system had reduced the wages which they had earned theretofore under the piece work rate sys-

tem, and that the 10 percent increase in the value of the unit which Trau proposed would not compensate the employees for the loss which they had suffered. In support of its contention the Union pointed to the effect that a 10 percent increase in the unit value would have on the wages of one or more of the committeewomen. Tuttle commented that, "if he was as dissatisfied as . . . the committee," he'd quit and "not go back in the shop and try to make everybody else dissatisfied." The discussion made it abundantly clear that the Union was opposed to the continuation of the Norris unit system . . . a position which the respondent evidenced no inclination to meet. The Union, through Miss Jordan, then proposed, "Mr. Trau, let's start at the top of the [proposed] contract and take each paragraph and what we can agree upon we will, and what we cannot we will make a question mark and come back and get to it." Trau replied, "There's no use wasting time on a ontract until we agree on wages and it'll be ten per cent. That's all we can stand." Miss Jordan then stated, "Yes, Mr. Trau, but you are not bargaining collectively. Let's start out and see what we can make out of it." Trau again replied, "There's no use wasting time." After arranging for a meeting on October 19, 1945, the conference then dissolved.

The meeting occurred on October 19, 1945, as previously arranged. Trau stated that he had a plan as to wages which he believed would satisfy 90 percent of the employees, and asked that the Union give him a few days to seek advice from an unidentified man "from a stitching plant." One of the committeewomen suggested that Trau tell "the girls" in the plant of his request. He agreed. Tuttle, who had left the meeting to hook up the loud speaker system in the plant, returned and advised, "For your information there hasn't a machine wheel turned in thirty minutes." Trau nevertheless spoke to the employees asking that they be patient, and stating that the committee had agreed "to give him until the 23rd [of October] to submit his plan." The employees and the committee then returned to work.

On October 23, 1945, the parties again met at the plant office. Trau opened the meeting by referring to a recent speech of the President of the United States, and stated that since listening to the President's speech, "he had decided to offer the Union an increase of 21¾ per cent in the value of the unit." The Union replied that such an increase would not, "in some cases, * * * bring their [the

employees] wages to what they were when they were taken off of piece rates." Trau again mentioned the "man from the stitching plant" and his plan, and stated that he had arranged for this man to discuss a "job evaluation plan" with the Union later in the week. The Union agreed to attend this discussion. Trau reiterated that there was no use in discussing a contract until the Union agreed to accept the unit system and that "it would be a dollar and five cents[2] and nothing more."

On October 27, 1945, pursuant to arrangements made theretofore, the Union met again with respondent. Trau introduced a Mr. Windsor as the "man from the stitching plant" to whom he had referred at the earlier meetings of October 19 and October 23. Windsor stated that respondent had assigned him to outline to the Union a job evaluation plan, and then proceeded to explain the plan. In response to an inquiry as to the effect of the plan on wages, Windsor replied that he had no authority to
56 discuss that problem beyond outlining and explaining the mechanics of the plan. Subsequently, on October 29, 1945, Trau gave the Union representative a written analysis of the plan,[3] and on November 1, 1945, he advised the employees in a speech at the plant of his offer to increase the unit value by 21¾ percent. The Union rejected the job evaluation plan in its entirety.

During the morning of November 2, 1945, the Union committee appeared at Trau's office and sought to continue negotiations. Jordan began the conference by stating that the Union "would like to try to negotiate a contract." Trau repeated that it would be futile to go into the contract until an agreement should be reached on wages. After some further discussion on the relative merits of the Norris unit system and the piece work rate system, the meeting was adjourned until that afternoon. When the meeting again convened, Trau requested the Union to calculate the labor cost under the Union's proposed piece work rate for producing each of the various garments respondent manufactured so that it could be compared with the labor cost under the Norris unit system.

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[2] One dollar and five cents represented the rate per 100 units after the 21¾ per cent increase was applied.

[3] The job evaluation plan suggested a formula whereby each employee's work would be evaluated in order to ascertain the worth of her or his operation. The written analysis thereof made it clear that the plan was to be effectuated jointly by the Union and the respondent.

Having made the calculations requested by Trau, the Union group informed Trau of the results at the latter's office on November 5, 1945. After some discussion, Trau reiterated that respondent would adhere to the use of the Norris unit system and that its offer of a 21¾ percent increase in the unit value was its final offer. Trau again declined to negotiate matters other than wages, stating that he "didn't see any use in that."

The meeting of November 5, 1945, described above, occurred in the morning. After lunch the employees returned to work. However, "the majority of the operators did not sew" and from 1 P. M. until 5 P. M. merely sat at their machines without performing any work. Respondent took no action beyond noting the stoppage of work on the time cards of those employees who had ceased work. At 5:00 P. M. the strikers left the plant, and later established a picket line in front of the plant. The strike was still in progress at the close of the hearing herein.

A few days after the strike commenced, the Union appealed to the Central Labor Union of Sherman, Texas, a council of local unions affiliated with the American Federation of Labor, "to try to get them [respondent] to see into some of the points which they [the Union and the respondent] were deadlocked upon." In response to this request, delegates from the Central Labor Union conferred with Trau. During the conference, the union group attempted to persuade Trau to accept the closed shop demands of the Union, and its contentions relating to the Norris unit system. The union group further advised Trau "what the Central Labor Body could do in the way of putting the Company on the unfair list."[4]

On November 20, 1945, A. F. Cadena, General Organizer for the Southwest District, American Federation of Labor, while on the picket line in front of respondent's plant, engaged in a conversation with Trau. Cadena suggested that there "was no reason for the turmoil of the strike," and that, "if he would meet with the * * * committee", he "thought they could get together on the thing and reach some agreement." Trau agreed to participate in a meeting on the following day with Cadena and the committee. The meeting so arranged began by Trau requesting that the Union submit its proposal. The Union replied that

[4] Subsequently, respondent was placed on the "unfair list" by the Central Labor Union, and on or about February 18, 1946, the delegates again visited Trau primarily to advise him that such action had been taken.

they had other proposals than those contained in the
57 suggested agreement submitted to Trau on October 16, 1945. The Union suggested that the only manner in which an agreement could ever be reached was to take the Union's proposed contract one article at a time—and then "get together on a give and take basis."[5] Trau's reply was "There's only one thing I can do and that is to get you people to agree on the units and put the girls back to work." Biggerstaff, a union committeewoman, stated, "Mr. Trau, if you cannot give us the union schedule of prices on piece rates the girls would be satisfied with the old piece rates that we were on when you went on the unit system plus the ten per cent increase in wages."[6] Trau asked that he be given time to consider this proposal, and suggested that they meet again on November 27, 1945.

The meeting of November 27, 1945, is described as follows by the testimony of witness Biggerstaff:

> He [Trau] said, "I don't think it will be necessary [for the committee] to get chairs. My remarks will be brief" . . . We [the committee] stood there. He [Trau] took this piece of paper in his hand . . . He said he had considered piece rates and they [respondent] were in no position to give them to us; that he had conferred with the stockholders and directors and that any statement he had heretofore made he was now withdrawing. Miss Jordan said, "Mr. Trau, . . . do you mean that this is your refusal to bargain in good faith with the Union?" He [Trau] said "I have no comments to make." We started out. Miss Jordan turned around and went back and said, "Mr. Trau, is this your final refusal to bargain with the Union?" He [Trau] said, "Oh, my doors are always open. I have no further comment to make."

On or about December 4, 1945, Cadena spoke to Trau and asked why he didn't "try to get together" with the striking employees. Trau replied that his "doors were open at all times," but that it appeared as though he was "probably meeting with the wrong committee" and that he "couldn't get along with the committee." Subsequent similar efforts by Cadena to secure a settlement of the dispute, including

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[5] Jordan told Trau that the Union was in the mood for trading—"horse trade if that is what he wanted to call it."

[6] Although this proposal obviously contemplated the abandonment of the Norris unit system, it represented a reduction of the Union's original rate demands.

several conversations with John M. Scott, respondent's attorney, were fruitless.

Subsequent to the beginning of the strike, the Union made numerous efforts to utilize the services of the United States Department of Labor, United States Conciliation Service, in settling its disputes with the respondent. The respondents refused to participate in meetings which that agency sought to arrange.[7]

2. The appropriate unit

The undersigned finds that all of the respondent's production employees at its Sherman, Texas plant, including employees in the shipping and cutting departments, and including the boiler room employees and the maintenance machinists, but excluding all main office employees, plant office employees, the shipping clerk, billing clerk, the assistant shipping department supervisor, floorladies and floormen, the piece goods foremen, the janitor, the watchman, the gardener and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, at all times material herein constituted, and now constitute a unit appropriate for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment, and that said unit insures to the employees of the respondent the full benefit of their right to self-organization and collective bargaining and otherwise effectuates the policies of the Act.[8]

3. Representation by the Union of a majority in the appropriate unit

At a secret ballot election conducted by the Board on December 7, 1943, among the employees in the unit found

[7] All of the facts set forth above in Section III are based on the credible testimony of witnesses produced by the Board. The respondent offered no evidence at the hearing herein and, further, did not by cross-examination or other method seek to contradict any of the testimony upon which the above findings of fact are based.

[8] This is the unit found to be appropriate by the Board in a Decision and Direction of Election dated November 15, 1943, involving the respondent's plant. See *Matter of Pool Manufacturing Company*, 53 N. L. R. B. 684. The complaint herein alleged substantially the same unit to be appropriate. The respondent at the hearing herein raised no issue with respect to the appropriateness of this unit.

above to be appropriate, the Union was designated by a majority of the employees who participated in said election. Accordingly, on December 17, 1943, the Board certified the Union as the exclusive representative of the respondent's employees in this unit. On November 17, 1944, the Union and the respondent executed a contract which by its terms terminated November 1, 1945. At the hearing herein, there was introduced in evidence by Board's counsel a list prepared by the respondent containing the names of all the respondent's employees in the unit herein found to be appropriate. The list shows that on November 5, 1945, the respondent had in its employ 196 persons in the said unit. Board's counsel also introduced in evidence a list prepared by Biggerstaff, the secretary-treasurer of the Union, who testified that the list contained the names of members of the Union who, on November 5, 1945, were employees of respondent. A comparison of the two lists by the undersigned shows that 106 of the names which appeared on the list of union members were *identical* with those which appeared on the list of employees prepared by the respondent.[9] The testimony of witness Biggerstaff was not contradicted, and the undersigned found her to be a credible witness.[10] The presumption of the Union's continuing majority flowing from the Board's certification and the contract executed by the Union and the respondent, on November 17, 1944, is thus corroborated by the showing of an actual majority on November 5, 5 days after the expiration of the contract. The respondent, in fact, at no time in its negotiations with the Union challenged the Union's status as bargaining representative.

Upon the basis of the foregoing findings of fact and upon the entire record, the undersigned finds that on October 16, 1945, the date of the first negotiations between the
59 Union and the respondent on a new contract and at all times material herein, the Union was duly designated collective bargaining representative of the re-

[9] Other names on the Union's list may very well have been the same persons appearing on the respondent's payroll list but were not counted by the undersigned in determining the Union's majority because whereas the person's full name appeared on one of the lists only a corresponding initial or a variation in spelling of the name appeared on the other list.

[10] Although respondent's counsel objected to the competency of the list prepared by witness Biggerstaff as proof of the identity of the Union's members, respondent made no effort to cross-examine the witness nor to in any way contradict her testimony on this issue. See *Stewart Die Casting Corporation v. N. L. R. B.*, 114 F. (2d) 849 (C. C. A. 7), enf'g 14 N. L. R. B. 872.

spondent's employees in the unit found to be appropriate. Pursuant to Section 9 (a) of the Act, the Union, therefore, was and is the exclusive representative of all the employees in such unit for the purpose of collective bargaining with respect to rates of pay, hours of employment, and other conditions of employment.

4. The refusal to bargain

It is obvious from the facts recited above that negotiations between the respondent and the Union had reached an impasse with respect to the Norris Unit Pay Plan which the respondent proposed to continue in operating its plant. The Act, of course, does not require that an employer agree to the demands of a union and, therefore, respondent's refusal to accede to the Union's request to return to the piece work rate system or to agree to the proposal for a closed shop does not constitute here a violation of the Act. Indeed, with respect to the issue involving the Norris unit system, it is apparent that the respondent made considerable effort to resolve this dispute by his counter offers of wage increases and his proposal to re-evaluate, with the Union's cooperation, the jobs of the individual operators who worked under the unit system. However, the Act clearly requires an employer to bargain on all matters involving the employees' terms and conditions of employment, and the undersigned is unable to perceive any validity in the respondent's contentions that the inability of the parties to agree on the subject of wages or the closed-shop issue constitutes a defense to a refusal to bargain with respect to the other matters which the Union requested to be considered. While doubtlessly the matter of wages was considered of primary importance by both parties, it is by no means evident, as the respondent seems to contend, that a resolution of this issue would have resulted in accord between the parties on all other matters for which the Union was the representative of the employees. Further, even conceding, *arguendo*, that an agreement by the parties on the subject of wages would effectuate such accord, one of the reasonable methods by which such an agreement might have been reached lay in the possibility that either the respondent or the Union might retreat from its seemingly inflexible position on the wage issue because of concessions given or taken during negotiations on items other than wages, *i. e.*, in this case, vacations, seniority, methods of handling grievances, etc. Indeed, the possibility that such negotiations might result in the Union relaxing its demands

on the wage issue was presented squarely to Trau on November 21, 1945, by Biggerstaff who said, "Mr. Trau, if we got a good contract out of you, you might be surprised at what we would tell you about the wages."

In view of the foregoing, the undersigned is of the opinion that the respondent's frequent protestations that his "doors are always open" for collective bargaining negotiations with the Union comprised no more than offers to meet for a limited purpose and, hence, did not express a willingness to comply with the requirements of the Act.[11]

60 The undersigned finds that on October 16, 1945,[12] and at all times thereafter, the respondent refused to bargain collectively with the Union as the representative of its employees in the appropriate unit and thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. The undersigned further finds that the strike at the respondent's plant beginning on November 5, 1945,[13] was caused and prolonged by the respondent's unfair labor practices in refusing to bargain collectively with the Union.

B. Interference, restraint, and coercion

1. The sequence of events

In January 1946, while the strike was still in progress, the respondent moved to restaff its plant.

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[11] The undersigned finds no merit in the Board's contention that the respondent's refusal to meet with the representative of the United States Conciliation Service constituted *per se* a refusal to bargain within the meaning of the Act. See *N. L. R. B. v. Columbia Enameling and Stamping Company, Inc.*, 306 U. S. 292. Nor is there merit in the Board's contention that the respondent committed any unfair labor practice by refusing upon request to furnish the Union data concerning earnings and production records of the employees in the bargaining unit. Without resolving the issues of credibility presented by the conflicting testimony of the Board's witnesses as to whether or not during the period such refusal is alleged to have occurred the Union actually made any request for such data, there was no evidence adduced to show that the negotiations between respondent and the Union were in any manner impeded by the latter's lack of such data.

[12] The date of the first bargaining conference on a new contract when the respondent for the first time asserted its position that it would not bargain on other proposals by the Union until the wage issue had been agreed upon. Succeeding conferences show that the respondent entered into negotiations with a fixed determination not to bargain on other union proposals until the wage issue was disposed of and adhered to this position at all times thereafter.

[13] The majority of the employees ceased work soon after 1.00 P. M. on November 5, 1945. The following morning November 6, 1945, all of the employees reported for work and immediately walked out en masse.

On January 18, 1946, respondent mailed a letter to each of its striking employees wherein it stated that it had not at that time "made any effort to replace" persons who were on strike, and that when it decided to do so it would be done through a newspaper advertisement "so that everyone will have an opportunity to protect his job rather than being replaced in our plant."[14]

On January 27, 1946, respondent inserted an advertisement in the Sherman Daily Democrat, a newspaper published in Sherman, Texas, soliciting applicants for permanent jobs at its plant. The advertisement stated in part that "employees now on strike may return without discrimination in pay rate."

On February 1, 1946, the respondent transmitted to each of its striking employees the following letter:

> As you know, we are employing a number of new operators in the plant and we want to train them for definite machines and operations.
>
> Will you please use the stamped self-addressed envelope attached to advise me if you expect to return to work as we want to protect your own operation for you so far as practical and not make it necessary for you to learn a new operation when and if you return.
> 61 Please understand that we do not require that you now return to work. You may remain on strike indefinitely, and we will have no "hard feelings". It is now clear that the strike is more or less permanent and we must proceed with our restaffing. The requested information will assist us in our program of handling this on the basis that you remain our employee even though we have had this unfortunate deadlock in our efforts to work together.
>
> Your suggestions will be appreciated.
>
> Yours very truly,
>
> F. G. TRAU
> *President*

[14] The letter also noted that respondent would "endeavor" to reinstate the strikers when they ended the strike, and warned the strikers that the respondent would not tolerate the conduct of certain "well known" persons "who have deliberately tried to threaten and intimidate" some of its employees who had not participated in the strike. On January 26, 1946, respondent filed a petition in the District Court of Grayson County Texas, Fifteenth Judicial District, petitioning that Court to issue an order restraining the Union and certain individual members thereof from the repetition of certain acts of violence and intimidation specifically alleged to have been committed. Apparently, as of the close of the hearing herein, the Court had made no determination of the issues presented in it.

On or about January 28, 1946, Ida McCullough, one of respondent's floorladies and a supervisory employee, visited the home of Fay Hood, one of respondent's striking employees. McCullough stated in substance that she was "around trying to get the girls to go back to work"; asked Hood whether she would return; she stated that the Union "wasn't going to get what they wanted anyway"; and warned that the respondent would hire replacements with the result that unless she returned to work immediately, Hood would be unable to secure employment later when she desired it. McCullough further stated that had the employees not been "misled" by the Union they would not have struck and that respondent was "not going to go Union."[15]

2. Conclusions

It is clear that the temporary restaffing by respondent of its plant in order to continue its business during the progress of the strike was an act within its rights. However, the prosecution of this right does not entail, as the respondent appears to contend, any right to bargain individually with its employees to the exclusion of the Union, their exclusive bargaining representative—particularly when, as heretofore found in this case, the respondent had refused to bargain with such representative as required by the Act. Obviously, and the undersigned so finds, the respondent's letters of January 18 and February 1, 1946, the activities of McCullough, and the entire course of respondent's conduct as set forth above in this section comprised a not-too-subtle attempt to accomplish a dissolution of the strike by means other than voluntary action of the strikers or collective bargaining with the Union. Further it is clear, and the undersigned so finds, that respondent did not seek merely to "bargain" with the individual employees in order to secure an end to their participation in the strike but by a carefully executed plan, attempted to accomplish its purpose by threatening them with either loss of their jobs or the need "to learn a new operation" unless the employees abandoned the strike immediately.[16]

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[15] None of the facts set forth above were the subject of dispute at the hearing, and the undersigned's findings are based on either exhibits introduced at the hearing without objection by respondent or the credible and uncontradicted testimony of witnesses for the Board.

[16] The Board introduced no evidence to support its allegation that the respondent had kept under surveillance the union activities of its employees.

Upon the basis of the above findings and upon the entire record herein, the undersigned finds that the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

62 IV. The effect of the unfair labor practices upon commerce

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, and such of them as have been found to be unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the respondent has engaged in certain unfair labor practices, the undersigned will recommend that the respondent cease and desist therefrom and take certain affirmative action which the undersigned finds will effectuate the policies of the Act.

It has been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit. In order to effectuate the policies of the Act, the undersigned will recommend that, upon request, the respondent bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms or conditions of employment.

The undersigned has found that the unfair labor practices of the respondent caused and prolonged the strike which began on November 5, 1945. In order to restore the *status quo* as it existed prior to the time the respondent committed the unfair labor practices, the undersigned will recommend that the respondent, upon application, offer reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, to those employees who went on strike and who have not previously applied for reinstatement; dismissing if necessary any persons hired by the respondent on or after November 5, 1945, and who were not in the employ of the respondent on said date. If thereupon, despite such reduction in force, there is not sufficient employment avail-

able for the employees to be offered reinstatement, all available positions shall be distributed among such employees without discrimination against any employee because of his union affiliation or activities, following such a system of seniority or other non-discriminatory practice to such an extent as has heretofore been applied in the conduct of the respondent's business. Those employees, if any, remaining after such distribution, for whom no employment is immediately available, shall be placed upon a preferential list and offered employment in their former or substantially equivalent positions as such employment becomes available and before other persons are hired for such work, in the order determined among them by such system of seniority or other non-discriminatory practice as has heretofore been followed by the respondent.

The undersigned will also recommend that the respondent make whole those employees who went out on strike, and who have not previously applied for reinstatement, for any loss of pay they may suffer by reasons of the respondent's refusal, if any, to reinstate them as provided above, by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from five (5) days after the date on which he applies for reinstatement to the date of the respondent's offer of reinstatement or placement on a preferential list, less his net earnings,[17] if any, during such period.

63 Upon a considered review of the entire record the undersigned is convinced that the respondent's conduct indicates an attitude of opposition by the respondent to the purposes of the Act generally. In order, therefore, to make effective the interdependent guarantees of Section 7 of the Act, to prevent a recurrence of unfair labor practice, and thereby minimize industrial strife which burdens and obstructs commerce, and thus effectuate the policies of the Act, the undersigned will recommend that the respondent cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

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[17] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for the unlawful refusal to reinstate and the consequent necessity of seeking employment elsewhere. See *Matter of Crossett Lumber Company*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work relief projects shall be considered as earnings. See *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. United Garment Workers of America, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All of the respondent's production employees at its Sherman, Texas plant, including employees in the shipping and cutting departments, and including the boiler room employees and the maintenance machinists, but excluding all main office employees, plant office employees, the shipping clerk, billing clerk, the assistant shipping department supervisor, floormen and floorladies, the piece goods foremen, the janitor, the watchman, the gardener, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 8 (5) of the Act.

3. United Garment Workers of America, affiliated with the American Federation of Labor, was on October 16, 1945, and at all times material herein has been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on October 16, 1945, and at all times thereafter to bargain collectively with United Garment Workers of America, affiliated with the American Federation of Labor, as the exclusive bargaining representative of all its employees in the appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the re-

spondent, Pool Manufacturing Company, Sherman, Texas, its officers, agents, successors and assigns shall:

64 1. Cease and desist from:

(a) Refusing to bargain collectively with the United Garment Workers of America, affiliated with the American Federation of Labor, as exclusive representative of all the respondent's production employees at its Sherman, Texas plant, including employees in the shipping and cutting departments, and including the boiler room employees and the maintenance machinists, but excluding all main office employees, plant office employees, the shipping clerk, billing clerk, the assistant shipping department supervisor, floorladies and floormen, the piece goods foremen, the janitor, the watchman, the gardener, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action;

(b) In any manner interfering with, restraining, and coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist United Garment Workers of America, affiliated with the A. F. L., or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with United Garment Workers of America, affiliated with the A. F. of L., as the exclusive representative of all the respondent's production employees at its Sherman, Texas plant, including employees in the shipping and cutting departments, and including the boiler room employees and the maintenance machinists, but excluding all main office employees, plant office employees, the shipping clerk, billing clerk, the assistant department supervisor, floorladies and floormen, the piece goods foremen, the janitor, the watchman, the gardener, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Upon application offer to those employees who went on strike on November 5, 1945, and thereafter, and who have

not previously applied for reinstatement, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner provided in Section entitled "The remedy" above; and place those employees for whom employment is not immediately avaliable upon a preferential list in the manner set forth in said section, and thereafter, in said manner, offer them employment as it becomes available;

(c) Make whole the employees specified in paragraph 2 (b) above, for any loss of pay they may suffer by reason of the respondent's refusal, if any, to reinstate them, by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from five (5) days after the date on which he applies for reinstatement to the date of the respondent's offer of reinstatement or placement upon a preferential list, less his net earnings,[18] if any, during said period;

(d) Post at its plant at Sherman, Texas, copies of the notice attached hereto marked "Appendix A". Copies of said notice to be furnished by the Regional Director for the Sixteenth Region, after being signed by the respondent's representative, shall be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. In addition copies of said notice shall be mailed by respondent to each of its employees who are presently on strike in the same manner that respondent mailed to such employees its letters of February 1, 1946, and January 18, 1946, mentioned in Section III B herein. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of the receipt of this Intermediate Report, what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the date of the receipt of this Intermediate Report, respondent notifies said Regional Director in writing that he has complied with the foregoing recommendations, the National Labor Relations Board issue an order requiring respondent to take the action aforesaid.

[18] See footnote 17, above

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective November 27, 1945, any party or counsel for the Board may, within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing, setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board. Any party desiring to submit a brief in support of the Intermediate Report shall do so within fifteen (15) days from the date of the entry of the order transferring the case to the Board, by filing with the Board an original and four copies thereof, and by immediately serving a copy thereof upon each of the other parties and the Regional Director.

JOSEPH C. WELLS
Joseph C. Wells
Trial Examiner

Dated: June 25, 1946.

66

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist UNITED GARMENT WORKERS OF AMERICA,

affiliated with the AMERICAN FEDERATION OF LABOR, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. All our employees are free to become or remain members of this union, or any other labor organization.

WE WILL BARGAIN collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is: all production employees, including employees in the shipping and cutting departments, and including the boiler room employees and the maintenance machinists, but excluding all main office employees, plant office employees, the shipping clerk, the billing clerk, the assistant shipping department supervisor, floorladies and floormen, the piece goods foremen, the janitor, the gardener and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

WE WILL, upon application, offer reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, to the employees who went on strike on November 5, 1945, and thereafter, and who have not previously applied for reinstatement. We will dismiss, if necessary, any persons hired on or after November 5, 1945, and not in our employ on that date. If thereupon, despite such reduction in force, there is not sufficient employment available for the employees to be offered reinstatement, all available positions will be distributed among such employees without discrimination against any employee because of his union affiliation or activities, following such a system of seniority or other non-discriminatory practice to such an extent as has heretofore been applied in the conduct of our business. Those employees, if any, remaining after such distribution for whom no employment is immediately available, will be placed upon a preferential list and offered reemployment to their former or substantially equivalent positions as work becomes available

and before other persons are hired for such work, in the order determined among them by such system of seniority or other non-discriminatory practice as we have heretofore followed.

POOL MANUFACTURING COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

68 In the United States Court of Appeals
For the Fifth Circuit

(Title Omitted)

Certificate of the National Labor Relations Board—February 4, 1949

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board—Series 5, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings had before said Board, entitled, "In the Matter of Pool Manufacturing Company and United Garment Workers of America Local Union No. 251," and "In the Matter of Pool Manufacturing Company and United Garment Workers of America, A.F.L.," the same being known as Cases Nos. 16-R-726 and 16-C-1298, respectively, before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

Case No. 16-R-726

1. Copy of order designating H. Carnie Russell Trial Examiner for the National Labor Relations Board, dated October 7, 1943.

2. Stenographic transcript of testimony held before Trial Examiner Russell on October 8, 1943, together with all exhibits introduced in evidence.

3. Copy of motion for exclusion on behalf of the United Garment Workers of America, Local Union No. 251.

69 4. Copy of Decision and Direction of Election issued by the National Labor Relations Board on November 15, 1943, together with affidavit of service thereof.

5. Copy of tally of ballots, dated December 7, 1943.

6. Copy of Certification of Representatives, issued by the National Labor Relations Board on December 17, 1943, together with affidavit of service thereof.

Case No. 16-C-1298

7. Copy of order designating Joseph C. Wells Trial Examiner for the National Labor Relations Board, dated April 29, 1946.

8. Stenographic transcript of testimony held before Trial Examiner Wells on April 29, 30, May 2, 20, 21, 1946, together with all exhibits introduced in evidence.

9. Copy of Trial Examiner Wells' Intermediate Report, dated June 25, 1946 (annexed to item 10 hereof); copy of order transferring case to the Board, dated June 28, 1946, together with copy of affidavit of service thereof.

10. Copy of Decision and Order issued by the National Labor Relations Board on August 26, 1946, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

IN TESTIMONY WHEREOF, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 4th day of February 1949.

FRANK M. KLEILER
Frank M. Kleiler
Executive Secretary

(SEAL)

NATIONAL LABOR RELATIONS BOARD

80 In the United States Court of Appeals
For the Fifth Circuit

No. 12683

(File Endorsement Omitted)

(Title Omitted)

Motion of the National Labor Relations Board for the Summary Entry of a Decree Upon the Transcript of the Record—Filed April 18, 1949

Now comes the National Labor Relations Board, by its Assistant General Counsel, and upon the petition for en-

forcement and the transcript of the record filed herein moves the Court for the entry of a decree enforcing the order of the Board. In support of this motion, the Board shows as follows:

1. The transcript of the record discloses:

(a) On April 10, 1946 the Board issued a complaint charging the respondent with certain violations of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Secs. 151, *et seq.*), herein called the Act. The respondent failed to file an answer to the complaint. Pursuant to notice, the matter proceeded to a hearing before a trial examiner.

(b) Although respondent participated fully in said hearing it offered no evidence by way of defense to the complaint. The uncontradicted evidence shows that the United Garment Workers of America, Affiliated with the American Federation of Labor, hereinafter called the Union, requested respondent to bargain on a number of matters involving terms and conditions of employment but that re-
81 spondent refused to bargain with the Union on any of the matters until an agreement was reached on the wage scale; that as a result of the respondent's refusal to bargain, the employees went out on strike; and that respondents sought to end the employees' participation in the strike by communicating with them individually and threatening them with loss of their jobs or the need to "learn a new operation" unless they abandoned the strike immediately.

(c) Following the hearing, the trial examiner on June 25, 1946 issued an intermediate report in which he found that the respondent was engaged in commerce within the meaning of the Act; that the respondent had refused to bargain collectively with the Union, as the exclusive bargaining representative of the respondent's employees within the appropriate unit, in violation of Section 8 (5) of the Act; and that the respondent had otherwise interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) of the Act.

(d) The trial examiner recommended that an order be issued against the respondent requiring it to cease and desist from the unfair labor practices found and requiring respondent to bargain collectively with the Union, to offer immediate and full reinstatement to those employees who had gone on strike, and to make them whole for any loss of

pay they may suffer by reason of the respondent's refusal, if any, to reinstate them, and to post appropriate notices.

(e) On June 28, 1946 an order was entered transferring the case to the Board, and on said date copies of the intermediate report and order were served upon the respondent's counsel.

2. Section 10 (e) of the Act, in force until August 22, 1947, provided that no objection that had not been urged before the Board should be considered by the Court upon application for enforcement of the Board's order unless the failure or neglect to urge such objection should be excused because of extraordinary circumstances. The Act was amended, effective August 22, 1947, but the foregoing provision restricting the scope of matters to be considered on application for enforcement continues unchanged. Under Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective July 12, 1944 (8 F. R. 16047, 16051, Section 202.33), a party wishing to object to an intermediate report was required to file a statement of exceptions within fifteen days from the date of the entry of the order transferring the case to the Board.

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3. The transcript of the record filed herein discloses that the respondent failed to file exceptions to the intermediate report before the Board, at no time sought leave to file such exceptions after the prescribed period of 15 days had elapsed, and that the Board did not allow any further period for filing the same. On August 26, 1946 the Board, in the absence of any exceptions by the respondent, adopted the findings, conclusions and recommended order of the trial examiner and issued the order sought to be enforced.

4. In view of the foregoing considerations, the Board respectfully submits that the respondent has waived all objections to the order, and there are no contestable issues before this Court.

Wherefore, the Board prays that a decree be entered granting the relief prayed in its petition for enforcement.

s/ A. Norman Somers
A. Norman Somers
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this 11th day of April, 1949.

93 In the United States Court of Appeals
For the Fifth Circuit

(File Endorsement Omitted)

(Title Omitted)

Reply to Motion of Petitioner for Summary Decree and Motion of Respondent for Leave to Take Additional Evidence—Filed April 18, 1949

Now comes Pool Manufacturing Company, Respondent herein, replying to the motion of Petitioner, National Labor Relations Board, for summary decree and applies to the Court for leave to take additional evidence, and for grounds for such reply and for such leave would respectfully show:

1.

The complaint upon which the order of the Board was rendered resulted in a hearing before a trial examiner in April and May of the year 1946. The report of the trial examiner was issued June 25, 1946, and the order now sought to be enforced was rendered August 26, 1946.

2.

Following the rendition of the order, Respondent, Pool Manufacturing Company, notified the Regional Director of the National Labor Relations Board that it accepted the order and complied with the requirements of the order of the National Labor Relations Board with respect to the affirmative actions, including the posting of notices. Substantially all of Respondent's employees who had been on strike prior to the hearing had returned to work before the order was rendered, and Respondent entered into collective bargaining with United Garment Workers of Amer-
94 ica, AF of L, concerning the affirmative action required by the Board order so that all differences between the Respondent and the Union relating to the return to work by the striking employees were fully settled by collective bargaining. The United Garment Workers of America, AF of L, did not seek to bargain with Respondent on wages, hours and working conditions following the return to work of the striking employees in the summer of 1946 until January of 1948. At that time by letter dated January 26, 1948, United Garment Workers of America, AF of L, requested Respondent to open negotiations on a proposed union contract. Respondent accepted the invitation and by agreement with the Union a bargaining conference was held on February 13, 1948, and a second bargaining conference held on February 20, 1948. At these two conferences, which were recorded by a court reporter, proposals from the union

were received and counter proposals from the Company to the Union were offered. The parties were unable to reach an agreement.

3.

Following the conference of February 20, 1948, the Union has made no effort to bargain with the Respondent, although Respondent has at all times been ready, able and willing to bargain with the Union. Respondent is advised and believes and now in good faith questions, whether the union now represents a majority of the employees within the unit specified by the Board order. The Union organizer, Miss Emily Jordan, has advised Respondent's attorney that the Amalgamated Clothing Workers of America, CIO, have a substantial group of members in the plant of the Respondent. Individual employees of Respondent have stated that they do not now belong to United Garment Workers of America, AF of L, and do not desire that such union represent them in collective bargaining. Respondent is unable to bargain collectively with United Garment Workers of America, AF of L, under the circumstances and such bargaining will not effectuate the policies of the Act.

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4.

Respondent would show that all the facts and circumstances set forth herein have occurred since the record in the instant case was closed and completed and that, therefore, Respondent could not offer such evidence before the Board at the time of the hearing. Respondent would show that the changed circumstances resulting from the facts and premises hereinabove set forth should be presented to the Board for its consideration to determine whether the order entered almost three years ago should now be revised or set aside to determine the question of whether United Garment Workers of America, AF of L, does in fact represent a majority of the employees within the unit, or whether the employees desire to exercise their right to choose another bargaining agent, or to bargain for themselves.

5.

Respondent would further show that since the rendition of the order in this case by the National Labor Relations Board, Congress has enacted the Fair Labor Standard Act effective August 23, 1947. That pursuant to the provisions of said Act, the duty to bargain is reciprocal between Respondent and the bargaining agent, and that the bargaining agent, United Garment Workers of America

AF of L, has not bargained in good faith with Respondent and has not endeavored to bargain with Respondent and that this fact constitutes a change in circumstances which under the law now in effect should be considered by the Board to determine whether its order should remain in the form originally issued three years ago. In that connection Respondent would show that the order of the Board and the enforcement order of the Court are prospective in nature, designed to establish a collective bargaining relation in the future, as distinguished from penalizing any party for acts and transactions which occurred more than four years ago.

WHEREFORE, premises considered, Respondent, Pool Manufacturing Company, prays that the motion of Petitioner, National Labor Relations Board, for a summary decree of enforcement be denied, and that this case be remanded to the Board with instructions for the taking of additional evidence pursuant to the provisions of Title 29, Section 160(e), USCA.

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Respectfully submitted,

POOL MANUFACTURING COMPANY
By: SAMUELS, BROWN, HERMAN & SCOTT
1210 Electric Bldg.
Fort Worth, Texas
Attorneys for Respondent

Of Counsel:
JOHN M. SCOTT
John M. Scott

THE STATE OF TEXAS }
COUNTY OF TARRANT }

BEFORE ME, the undersigned authority, a Notary Public in and for Tarrant County, Texas, on this day personally appeared JOHN M. SCOTT, who after being by me duly sworn does on oath say that he is the attorney of record for Pool Manufacturing Company, a corporation; that upon information and belief, the facts set forth hereinabove are true and that the foregoing motion for leave to take additional evidence is filed in good faith and not for the purpose of delay, solely that justice may be done.

JOHN M. SCOTT

Subscribed and sworn to before me by the said JOHN M. SCOTT on this the 16 day of April, A. D. 1949.

OPAL CONDER
(SEAL) *Notary Public, Tarrant County, Texas*

97 In the United States Court of Appeals
For the Fifth Circuit

(FILE ENDORSEMENT OMITTED)

(TITLE OMITTED)

Opposition to Respondent's Motion for Leave to Take Additional Testimony—Filed May 3, 1949

An analysis of respondent's reply to the Board's motion for the summary entry of a decree and of respondent's motion for leave to take additional evidence shows:

1. Respondent impliedly concedes that the Board's order was valid and proper when it was entered. This is evidenced by: (a) respondent's failure to file any exceptions to the intermediate report which the Board adopted; (b) its present failure to attack the validity of the order, and its assertion (Reply, Par. 2) that it notified the Regional Director of the Board "that it accepted the order" and that it has complied with its requirements; and (c) and the limitation of its defenses to matters alleged to have occurred subsequent to the entry of the Board's order, or, as respondent states (*id.* par. 2) "since the record in this case was closed and completed."

2. Since respondent urges no defense whatsoever to the enforcement of paragraph 1 (b) of the Board's order, which requires respondent to cease and desist from interfering with, restraining and coercing its employees in the exercise of their rights to self organization, the Board is entitled to enforcement of that portion of the order without regard to any other issue here raised.

98 3. Insofar as respondent resists enforcement of the portions of the order other than paragraph 1 (b), respondent urges the following matters concerning which it also desires to offer additional testimony: that "substantially all of Respondent's employees who had been on strike prior to the hearing had returned to work;" (Reply, Par. 2); that it engaged in two bargaining conferences with the Union, on February 13 and 20, 1948, which did not result in an agreement (*ibid.*) and following which the Union has "made no effort to bargain with Respondent, although Respondent has at all times been ready, able, and willing to bargain with that Union." (*id.*, Par. 3); and that respondent questions whether the Union now represents a majority of the employees in the appropriate unit, because, as it asserts, "Individual employees of respondent have

stated that they do not now belong to the United Garment Workers of America, A. F. of L., and do not desire that such union represent them in collective bargaining."

It is apparent that the new matters urged by respondent, vaguely and duplicitously stated at best, are prematurely presented. The averment that "*substantially all*" of the employees have returned to work, implies that some, at least, have not returned, and affords no indication that respondent offered the employees who went on strike "full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges," as required by paragraph 2 (b) of the order.[2]

At all events, the issue whether respondent has complied is prematurely raised. It is too well settled to require extended discussion that compliance with the Board's order is not a defense to the entry of a decree of enforcement. This Court has held that "in a proceeding of this kind, it is the validity of the Board's order when made which is in question, and that whether the employer has or has not complied with it is totally irrelevant." *N. L. R. B. v. Fickett-Brown Mfg. Co., Inc.*, 140 F. 883, 884. "Whether and to what extent respondent actually complied are matters which it will be time enough for us to inquire into and determine if and when any substantial controversy over compliance arises after the entry of our order enforcing that of the Board." *N. L. R. B. v. Hills Brothers Co.*, 161 F. 2d 179, 180 (C. A. 5). See, also, *N. L. R. B. v. Pure Oil Co.*, 103 F. 2d 497, 498 (C. A. 5); *N. L. R. B. v. Southern Wood Preserving Co.*, 135 F. 2d 606, 607 (C. A. 5); *N. L. R. B. v. Sewell Mfg. Co.*, 172 F. 2d 459, 461.

The Supreme Court has consistently applied this rule. *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 230; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 600; and cf. *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *Southport Petroleum Co., v.*

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[2] This omission is not remedied by the further allegation that "all differences between the Respondent and the Union relating to the return of work by the striking employees were fully settled by collective bargaining." Respondent's obligation to offer reinstatement to all employees is not one that can be settled by negotiation, and it is the duty of the Board acting in the public interest to secure enforcement and compliance of its order. *Waterman S. S. Corp. v. N. L. R. B.*, 119 F. 2d 760, 762 (C. A. 5, on contempt).

N. L. R. B., 315 U. S. 100, 106, affirming 117 F. 2d 90 (C. A. 5).

Manifestly, if respondent has complied with the Board's order and has offered reinstatement to all the strikers in the manner required by the order, it cannot be prejudiced in any way by the entry of a decree of enforcement. Conversely, if respondent has not complied fully, the entry of the Court's decree is appropriate to insure such compliance. In any event, as this Court held in *Hills Brothers* case, *supra*, and as the Supreme Court held in the *Southport Petroleum* case, *supra*, whether respondent has complied is an issue to be determined after the entry of the decree, in a contempt proceeding brought when necessary to secure compliance. Since no issue has been raised by respondent as to "the validity of the Board's order when made" (*Fickett-Brown* case, *supra*), the order should be enforced.

Also duplicitous is the allegation that respondent has held two bargaining conferences with the Union, which did not result in an agreement. There is no suggestion that further bargaining is useless or that all avenues of
100 agreement have been exhausted. The possibility still exists that the Union might recede from some of its demands or might convince respondent of the merit of Union's position. Here, also, respondent is not prejudiced by a decree of enforcement, since it need bargain with the Union, only upon request.

As in the case of the reinstatement provision, the question of whether respondent has complied with the bargaining order is not properly before the Court at this time. Only if respondent refused to bargain, upon request, after the entry of a decree of enforcement, and if the Board institutes contempt proceedings, will the issue arise as to whether the respondent had satisfied its obligation to bargain.

Respondent's final contention, i.e., that the order should not be enforced because respondent "doubts" whether the Union still represents a majority, is clearly no bar to enforcement. Even an actual loss of majority following an employer's illegal refusal to bargain with the Union would be no bar to enforcement of a remedial order based upon such illegal refusal. *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702, 704, 705; *N. L. R. B.* v. *Lovoron*, 172 F. 293, 294-5 (C. A. 5). *A fortiori*, should enforcement not be withheld where the sole showing of the employer is a "doubt" based

upon the assertion that "individual employees of Respondent have stated that they do not now belong to [the Union] and do not desire that such union represent them in collective bargaining." To grant additional hearings on the basis of such an inconclusive showing would be to invite an endless cycle of litigation and make a "merry-go-around of the Act." *N. L. R. B.* v. *Condenser Corporation*, 128 F. 2d 67, 81 (C. A. 3). Until, following the restoration of conditions for a free choice by the employees, the employees have in appropriate proceedings under Section 9 (c) of the Act indicated a contrary choice, the obligation to deal with the certified union continues and the Board is entitled to a decree enforcing its order to bargain. *N. L. R. B.* v. *Lovvorn*, *supra*.

101 CONCLUSION

It is clear from the foregoing discussion that none of the matters alleged in respondent's reply and countermotion is a bar to enforcement of the Board's order. The respondent's motion for leave to take additional evidence as to these matters should, therefore, be denied. Since respondent concedes that the Board's order was valid and proper when entered, a decree of enforcement should be issued herein.

Respectfully submitted,

DAVID P. FINDLING
Associate General Counsel

A. NORMAN SOMERS
Assistant General Counsel

ABRAHAM H. MALLER
Attorney

National Labor Relations Board

April 1949.

102 In the United States Court of Appeals
For the Fifth Circuit

No. 12683

NATIONAL LABOR RELATIONS BOARD,
Petitioner

versus

POOL MANUFACTURING COMPANY,
Respondent

PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, SITTING AT WASHINGTON, D. C.

Opinion—May 13, 1949

ON MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR THE SUMMARY ENTRY OF A DECREE UPON THE TRANSCRIPT OF THE RECORD.

Before HUTCHESON, SIBLEY, and HOLMES,
Circuit Judges.

Per Curiam: The above motion came on to be heard by the court on the petition and brief of petitioner and on the reply of respondent, and its motion to take additional evidence.

103 Representing that the order sought to be summarily enforced was fully complied with by the respondent as ordered by the board and within the time fixed in the order; and that nearly three years has elapsed since entry of the order and compliance therewith, respondent prayed that the motion for summary judgment be denied and the matter be remanded to the Board to take additional evidence.

On consideration thereof, the Court is of the opinion that action on petitioner's motion should be deferred and the matter be referred back to the Board with directions to take evidence and report: (1) whether and to what extent its order has been complied with by respondent; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises; and it is so ORDERED.[1]

[1] Cf. N. L. R. B. v. *Prima*, 172 Fed. (2) p. 948

104 In United States Court of Appeals

NATIONAL LABOR RELATIONS BOARD

No. 12683 versus

POOR MANUFACTURING COMPANY

Order Deferring Action on Motion and Referring Motion Back to Board to Take Evidence and Report—May 13, 1949

This cause was submitted to the Court on the motion of the National Labor Relations Board for the Summary Entry of a Decree upon the Transcript of the Record, and on the Reply of the Respondent to said Motion;

On consideration thereof, It is ordered by this Court that action on petitioner's motion be deferred and the matter is referred back to the Board with directions to take evidence and report: (1) whether and to what extent its order has been complied with by respondent; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises.

105 In the United States Court of Appeals
For the Fifth Circuit

(Title Omitted)

Petition of the National Labor Relations Board for Rehearing—Filed June 3, 1949

Comes now the National Labor Relations Board and petitions this Court for a rehearing in the above-entitled proceeding. In support of its petition, the Board respectfully shows the Court as follows:

1. The decision of this Court is contrary to the intention of Congress, given effect by the controlling decisions of the Supreme Court and all the Courts of Appeals, that the Board is entitled to enforcement of a validly issued order without regard to whether there has been compliance therewith.

The question whether compliance with a Board order should be considered by the Court in an enforcement proceeding was considered by Congress when it enacted the original National Labor Relations Act (49 Stat. 449). To obviate the materiality of compliance, the Conference Committee deliberately changed the language of 10 (c) from

that contained in the original Federal Trade Commission Act (38 Stat. 717, 720) to its present form. The change was explained as follows (H. Rep. No. 1613, 74th Cong., 1st Sess., p. 5):

> Section 10 (e) of the Senate bill provided that "If such person fails or neglects to obey such order of the Board while the same is in effect, the Board may petition any circuit court of appeals, etc. House amendment No. 15 strikes out the quoted phrase and substitutes "The Board shall have power to petition any circuit court of appeals, etc. The conference agreement accepts this amendment. The purpose is to provide for more expeditious procedure. Delay in enforcement procedure due to technicalities would be especially harmful under this act. It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commission Act, neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings.

This Congressional intent, so clearly expressed, has been followed by the Supreme Court (*N. L. R. B.* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 230; and cf. *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *Southport Petroleum Co.* v. *N. L. R. B.*, 315 U. S. 100, 106, affirming 117 F. 2d 90 (C. A. 5)), and by the Courts of Appeals of every circuit.[1]

[1] The following cases apart from this Court's own decisions cited in the text above, are illustrative of the decisions of the Court of Appeals holding that discontinuance of the proscribed conduct through voluntary compliance with the Board's order is immaterial in a proceeding brought to enforce the Board's order:

Continued on page

107 This Court has given effect to this doctrine by holding that "in a proceeding of this kind it is the validity of the Board's order when made which is in question, and that whether the employer has or has not complied with it is totally irrelevant." *N. L. R. B.* v. *Fickett-Brown Mfg. Co., Inc.*, 140 F. 2d 883, 884. This Court has further stated that "whether and to what extent respondent actually complied are matters which it will be time enough for us to inquire into and determine if and when any substantial controversy over compliance arises after the entry of our order enforcing that of the Board." *N. L. R. B.* v. *Hills Brothers Co.*, 161 F. 2d 179, 180. See, also, *N. L. R. B.* v. *Pure Oil Co.*, 103 F. 2d 497, 498; *N. L. R. B.* v. *Southern Wood Preserving Co.*, 135 F. 2d 606, 607; *N. L. R. B.* v. *Sewell Mfg. Co.*, 172 F. 2d 459, 461.

108 Furthermore, when Congress enacted the Labor Management Relations Act, 1947 (61 Stat. 136), it reaffirmed its intention that compliance with the Board's order should not be an issue in enforcement proceedings. The legislative history of that Act discloses that Congress considered and rejected proposals that Section 10 (e) be amended to make petitions for enforcement conditional

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First Circuit: *National Labor Relations Board* v. *Draper Corporation*, 159 F. 2d 294, 297; *National Labor Relations Board* v. *L. H. Hamel Leather Co.*, 135 F. 2d 71, 72-73; *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. 2d 249, 252.

Second Circuit: *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421.

Third Circuit: *National Labor Relations Board* v. *McLain Fire Brick Co.*, 128 F. 2d 393, 394; *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81.

Sixth Circuit: *National Labor Relations Board* v. *Toledo Desk & Fixture Company*, 158 F. 2d 426; *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. 2d 618, 619; *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 300.

Seventh Circuit: *National Labor Relations Board* v. *Bachelder*, 125 F. 2d 387, 388; *National Labor Relations Board* v. *Gerling Furniture Manufacturing Co., Inc.*, 103 F. 2d 663.

Eighth Circuit: *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 239, certiorari denied, June 14, 1948, No. 785, Oct. Term, 1947; *National Labor Relations Board* v. *Swift & Company*, 129 F. 2d 222, 224.

Ninth Circuit: *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 250 (C. C. A. 9); *National Labor Relations Board* v. *American Potash and Chemical Corp.*, 98 F. 2d 488.

District of Columbia: *National Labor Relations Board* v. *National Laundry Co.*, 138 F. 2d 589, 590.

upon noncompliance. See Legislative History of the Labor Management Relations Act, 1947 (Government Printing Office, 1948), pp. 70, 197, 334, 384, 559.[2]

As this petition is being prepared, the Supreme Court on May 31, 1949, handed down its opinion in *N. L. R. B. v. Crompton-Highland Mills, Inc.*, Case No. 197, reversing the decision of this Court in 167 F. 2d 662. Reaffirming its previous holdings as to the irrelevancy of compliance in an enforcement proceeding, the Supreme Court said at page 8, note 7 of the slip opinion:

> Even though the employer, since January 1, 1946, may have carried on collective bargaining in good faith as to rates of pay and other matters, a decree enforcing the original order against making a general increase without consulting the collective bargaining representatives is justifiable. "* * * an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." *Labor Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271. See also, *Federal Trade Comm'n v. Goodyear Tire & Rubber Co.*, 304 U. S. 257.

109 In view of the foregoing, it is clear that the order of this Court is contrary to the intention of Congress and to the unanimous holdings of the Supreme Court that compliance is not a defense to enforcement of a validly issued Board order.

2. The decision of this Court is a deterrent to the prevention of unfair labor practices, as contemplated by Congress.

In view of the clear legislative intent, twice expressed by Congress, and again reaffirmed by the Supreme Court's most recent pronouncement in *N. L. R. B. v. Crompton-Highland Mills, Inc., supra*, it is perhaps unnecessary to point out that sound public policy supports the view that compliance may not be inquired into in an enforcement

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[2] Even if Congress had not specifically rejected the theory upon which the order in the instant case is based, it is clear that such would be the effect of the re-enactment of Section 10 (e) without change after the unanimous judicial interpretations of that Section as barring compliance as a defense in an enforcement proceeding. It is well settled that re-enactment of a statutory provision after long years of uniform judicial construction and application expresses legislative satisfaction with the construction so adopted. *Johnson v. Manhattan Ry. Co.*, 289 U. S. 479, 500; *Heald v. District of Columbia*, 254 U. S. 20, 25.

case, but only in a subsequent contempt case. The possibilities of making a "merry-go-around of the Act" (*N. L. R. B.* v. *Condenser Corp.*, 128 F. 2d 67, 81 (C. A. 3)) are at once apparent. If the plea of compliance can validly hold up enforcement of the present order, then it can just as validly hold up enforcement of any order that the Board might make after a hearing of the kind now directed by the Court, and the case may again be sent back this time for a third hearing and order, and so on *ad infinitum*. Congress, foreseeing these possibilities, refused to make such a plea a basis for holding up enforcement of an order, and the Supreme Court, equally aware of these dilatory possibilities, has repeatedly given effect to the doctrine that post-order compliance is not a deterrent to enforcement of a validly issued order. *Pennsylvania Greyhound* and *Crompton-Highland* cases, *supra*. On the other hand, other respondents have already shown awareness of the
110 rich possibilities of delay inherent in any rule which would make a plea of the kind entertained here a deterrent to enforcement of the order. The same plea has been made to prevent enforcement of orders to bargain in other cases pending before this Court, in which there was no basis for attacking the validity of the order when issued.[3]

This Court is undoubtedly aware of the fact that delay itself is one of the most effective weapons available to the company bent upon destroying a union, particularly when the union has just been organized. Experience and logic both demonstrate that employees who become members of a newly organized union or local are not likely to remain as members if the union accomplishes nothing for them. In such a situation, an employer can effectively thwart the employees' right to organize, guaranteed by the Act, by refusing to bargain collectively with the union. Even under the most favorable conditions, a considerable time must elapse while charges are filed and investigated, a complaint is issued, a hearing is held, an intermediate report is issued, possible exceptions are filed, argued and considered, a decision and order is issued, and a petition for enforcement is filed. If compliance with the Board's order becomes a relevant consideration in the enforcement case, the company is given a new and, indeed, a golden opportunity to further delay bargaining with impunity. The simple ex-

[3] *E. g. N. L. R. B.* v. *Mexia Textile Mills, Inc.*, Case No. 12763; *N. L. R. B.* v. *Union Manufacturing Co.*, Case No. 12718.

pedient is immediately upon issuance of the Board's order to hold a conference or two with the union, repeat the same acts of intrasigence which led to the original order,
111 and then when the enforcement petition is filed, assert with the same boldness with which in the original proceeding it had claimed to have obeyed the statute, that it has now obeyed the order, and then have the case remanded to the Board to litigate the issues and report back. And as noted above, there would be nothing to prevent a respondent from repeating the same tactic in opposition to the Board's subsequent report.

Even if the Board finally obtains a decree of enforcement, the union, during this delay, will have lost the support of its members and even ceased to exist so that any victory which the Board may achieve for the employees would be an empty one.

Opposed to this is the desirable procedure implicit in the *Pennsylvania Greyhound* doctrine to which this Court had given effect prior to its now reversed *Crompton-Highland* decision (See *Hills Bros.* and *Fickett-Brown* cases, *supra.*) Under such procedure the Court by entering a decree based on the validity of the order when entered and deferring questions of compliance to the stage after decree prevents much of the delay which would otherwise be encountered. If the company has bargained in good faith, it has nothing to fear from the entry of a decree. If the Board should institute contempt proceedings, the company may defend on the ground that it has fully complied with the Board's order, as enforced, and, if the Court agrees, the employer will prevail in the contempt proceeding. Conversely, if it should thereafter appear that the claim of compliance is unfounded, then it is all the more necessary that a decree be entered "expeditiously" (Sec. 10 (i)) so that the sanction of this Court may be invoked to insure such
112 compliance with the least possible delay.

In brief, a company which in good faith wishes to comply with an order of the Board has nothing to fear from an enforcement decree, regardless whether it has already made an effort to comply.

Conclusion

As we have shown, the decision of this Court is a complete departure from the well-established principle that compliance is not a defense in enforcement proceedings. The decision may have far-reaching effects and will produce a result contrary to the clear intent of Congress.

WHEREFORE, the Board prays that its petition for rehearing be granted, that upon rehearing the Court vacate and set aside its order of May 13, 1949, and issue in its stead an order granting enforcement of the Board's order and denying the respondent's motion for leave to take additional evidence, and grant such other and further relief as the Court may deem proper.

DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

ABRAHAM H. MALLER,
Attorney,

National Labor Relations Board.

June 1949

CERTIFICATE OF COUNSEL

Comes now A. Norman Somers, Assistant General Counsel of the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith and not for purposes of delay.

(Signed) A. NORMAN SOMERS
A. Norman Somers
Assistant General Counsel
National Labor Relations Board

Dated this 2nd day of June, 1949.

113 In the United States Court of Appeals

(TITLE OMITTED)

Order Denying Rehearing—June 14, 1949.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

114 Clerk's Certificate to foregoing transcript omitted in printing.

115 Supreme Court of the United States

No....., October Term, 1949

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
POOL MFG. CO.

Order Extending Time Within Which to File Petition for Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 28, 1949.

FRED M. VINSON
Chief Justice of the United States.

Dated this 26th day of August, 1949.

116 In the Supreme Court of the United States

October Term, 1949

No.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
POOL MANUFACTURING COMPANY,
RESPONDENT

Stipulation as to Record

1. Subject to the approval of this Court, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that for the purpose of the petition for a writ of certiorari, and, in the event the petition be granted, for the purpose of hearing and determining the issues involved, the printed record shall consist of the following:

(a) Petition for enforcement.
(b) Order to file petition for enforcement.
(c) Certification of representatives.
(d) Complaint.
(e) Charge.
(f) Notice of hearing.
(g) Intermediate report of the trial examiner.
(h) Order transferring case to National Labor Relations Board.

(i) Decision and order of National Labor Relations Board.
(j) Certificate of National Labor Relations Board.
(k) Motion for summary entry of decree.
(l) Reply to motion of petitioner for summary decree and motion of respondent for leave to take additional evidence.
117 (m) Opposition to respondent's motion for leave to take additional testimony.
(n) Opinion of the court upon motion for the summary entry of decree.
(o) Order deferring action on motion and referring motion back to Board to take evidence and report.
(p) Petition of National Labor Relations Board for rehearing.
(q) Order denying rehearing.

2. It is further stipulated and agreed that either of the parties hereto may refer in its brief and argument to the unprinted portion of the record referred to above.

PHILIP B. PERLMAN
Philip B. Perlman
Solicitor General

JOHN M. SCOTT
Counsel for Respondent.

September 12, 1949.

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Supreme Court of the United States

No. 435—October Term, 1949

Order allowing certiorari—Filed January 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

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CITATIONS

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National Labor Relations Board v. *Mexia Textile Mills*, (C. A. 5), decided June 3, 1949 7

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National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., Supp. II, 51, *et seq.*):

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Section 35, Article II (8 Fed. Reg. 16047, 16051, Section 202.35) 4

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 435

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

POOL MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the order of the Court of Appeals for the Fifth Circuit, entered on May 13, 1949, deferring action on the Board's motion for the summary entry of a decree and remanding this case to the Board with directions to take evidence and report on questions concerning compliance by the employer, Pool Manufacturing Company, with the Board's order.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R.

31-50) are reported in 70 N. L. R. B. 540. The *per curiam* opinion of the Court of Appeals (R. 66) is reported in 24 L. R. R. M. 2147.

JURISDICTION

The order of the Court of Appeals was entered on May 13, 1949 (R. 67). The Board's petition for rehearing was denied on June 16, 1949 (R. 67-73). On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a petition for a writ of certiorari was extended to and including October 28, 1949 (R. 74). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether questions concerning subsequent compliance by an employer with an order of the National Labor Relations Board may properly be considered by a court of appeals in connection with a petition by the Board to enforce its order.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Sec. 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

Pursuant to charges filed by United Garment Workers of America, affiliated with the American

Federation of Labor, herein called the Union (R. 28-29), the Board, on April 10, 1946, issued a complaint against Pool Manufacturing Company, herein called the Company, alleging that the Company had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act (R. 24-28). A hearing on the complaint was held before a trial examiner, who, thereafter, on June 25, 1946, issued his intermediate report, finding that the Company, in violation of Section 8(1) and (5) of the Act, had refused to bargain with the Union which had been certified by the Board as the employees' bargaining representative; that such refusal to bargain had caused and prolonged a strike among the Company's employees; and that during the strike the Company had engaged in various acts and conduct interfering with the exercise of the rights guaranteed its employees under Section 7 of the Act, including threats of loss of their jobs if they failed to abandon the strike immediately (R. 33-50). To remedy these unfair labor practices, the trial examiner recommended that the Company cease and desist therefrom; upon request, bargain with the Union; offer the striking employees reinstatement to their former or substantially equivalent positions with back pay from the date of the Company's refusal to reinstate them; and post appropriate notices (R. 50-55).

On June 28, 1946, the Board entered an order transferring the case to the Board, and on the same

date a copy of said order and of the intermediate report were duly served upon the Company (R. 30, 56). The Company at no time thereafter filed any exceptions to the intermediate report as permitted by Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended (8 Fed. Reg. 16047, 16051, Section 202.33) then in effect.[1] On August 26, 1946, pursuant to the provisions of Section 35 of Article II of the Rules and Regulations of the Board (8 Fed. Reg. 16047, 16051, Section 202.35),[2] the Board issued its order adopting the findings, conclusions and recommended order set forth in the intermediate report (R. 31-33).

On February 9, 1949, the Board filed its petition

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[1] The pertinent provisions of Section 33 read as follows: "Within fifteen days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of this Article, any party or counsel for the Board may file with the Board at Washington, D. C., an original and four copies of a statement in writing setting forth such Exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. * * *

"No matter not included in a statement of Exceptions may thereafter be objected to before the Board, and failure to file a statement of Exceptions shall operate as a submission of the case to the Board on the record."

[2] Section 35 provides that: "Upon the expiration of the period for filing a statement of Exceptions and brief, as provided in Section 33 of this Article, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other agent or agency, or may close the case upon compliance with the recommendations of the Intermediate Report, or may make other disposition of the case."

for enforcement in the court below (R. 1-6) and thereafter filed a certified transcript of the record (R. 55-56). On April 18, 1949, the Board also filed in the court below its motion for the summary entry of a decree to enforce its order, alleging that in view of Section 33 of the Board's Rules, above mentioned, and of Section 10(e) of that Act, as amended, which provides that no objection which has not been urged before the Board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances, the Company's failure to file exceptions to the trial examiner's findings and recommended order constituted a waiver of all objections to the order of the Board and that no contestable issue was before the court (R. 56-58). In response to the Board's petition, the Company, on April 18, 1949, filed a motion to remand the case to the Board for the purpose of adducing additional evidence to show that the Company had complied at least in part with the provisions of the Board's order of August 26, 1946; that, after bargaining with the Union, the parties had been unable to reach an agreement; that the Union has not bargained in good faith; and that the Union may not now represent a majority of its employees (R. 59-61).

The Board, on May 3, 1949, filed its opposition to the Company's motion to remand (R. 62-65). On May 13, 1949, the court below entered its order deferring action on the Board's motion for sum-

mary judgment and remanding the case to the Board with directions to take evidence and report (1) whether and to what extent the Company has complied with the Board's order; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises (R. 67). On June 3, 1949, the Board filed its petition for rehearing (R. 67-73) which the court below denied on June 16, 1949 (R. 73).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In deferring action on the Board's motion for the summary entry of a decree upon the transcript of the record.

2. In remanding the case to the Board with directions to take evidence and report to it on questions concerning compliance with the Board's order.

3. In failing to grant the Board's motion for summary entry of a decree upon the transcript of the record.

REASONS FOR GRANTING THE WRIT

This is one of the five cases which, as is set forth in the Board's petition for a writ of certiorari in *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, No. 431, pp. 10-23, filed contemporaneously, the Board has selected as vehicles for

bringing before this Court its difficulties in securing enforcement of its orders in the Fifth Circuit. In *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, decided on June 3, 1949, in which we have simultaneously herewith filed a petition for a writ of certiorari, the court below entered an order identical with that here involved. In our petition in that case we have pointed out that the action of the court below in remanding the case to the Board with directions to take evidence and report on questions concerning compliance with the Board's order was contrary to the controlling decisions of this Court and in conflict with the decisions of all the other courts of appeals which have passed on that question. We have pointed out further that such action is contrary to the clear Congressional intent and that it seriously jeopardizes the effective administration of the Act. Since the question involved in this case is precisely the same as that involved in the *Mexia* case, we respectfully refer the Court to the reasons for granting the writ which are set forth in our petition in that case.

CONCLUSION

For the reasons stated in the *Mexia* petition, we respectfully submit that this petition for a writ of certiorari should be granted and that the order entered by the court below on May 13, 1949, should be reversed without oral argument and the case remanded to the court below with directions to enter a decree enforcing the Board's order as re-

quested in the Board's petition for enforcement and in its motion for the summary entry of a decree.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

OCTOBER 1949.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * * * *

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Sec. 141, *et seq.*) are as follows:

* * * * * * *

SEC. 10. * * *

* * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board,

its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 435

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

POOL MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 31-50) are reported in 70 N.L.R.B. 540. The *per curiam* opinion of the Court of Appeals (R. 66) is reported in 24 L.R.R.M. 2147.

JURISDICTION

The order of the Court of Appeals was entered on May 13, 1949 (R. 67). The Board's petition for rehearing was denied on June 16, 1949 (R. 67-73).

On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a petition for a writ of certiorari was extended to and including October 28, 1949. (R. 74). On October 28, 1949, the Board filed its petition for a writ of certiorari which was granted on January 9, 1950 (338 U. S. 909). The jurisdiction of this Court rests on Section 10 (e) of the National Labor Relations Act, as amended, and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether questions concerning subsequent compliance by an employer with an order of the National Labor Relations Board may properly be considered by a court of appeals in connection with a petition by the Board to enforce its order.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. (Supp. II) 141, *et seq.*) are set forth in the Appendix to the brief for the National Labor Relations Board in the *Mexia Textile Mills* case, No. 434, this Term.

STATEMENT

Pursuant to charges filed by United Garment Workers of America, affiliated with the American Federation of Labor, herein called the Union (R. 28-29), the Board, on April 10, 1946, issued

a complaint against Pool Manufacturing Company, herein called the Company, alleging that the Company had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act (R. 24-28). A hearing on the complaint was held before a trial examiner, who, thereafter, on June 25, 1946, issued his intermediate report, finding that the Company, in violation of Section 8 (1) and (5) of the Act, had refused to bargain with the Union which had been certified by the Board as the employees' bargaining representative by persistently refusing to discuss any provision of the Union's proposed contract unless wages were first agreed upon; that such refusal to bargain had caused and prolonged a strike among the Company's employees which was still in progress at the date of the Board hearing; and that during the strike the Company had not only continued to reject all Union requests for the negotiation of terms and conditions of employment other than wages but had withdrawn all its previous counterproposals in regard to that subject and had otherwise interfered with the exercise of the rights guaranteed its employees under Section 7 of the Act by individually soliciting them to return to work and threatening loss of their jobs if they failed to abandon the strike immediately (R. 33-50). To remedy the unfair labor practices in which the Company was found to have engaged, the trial

examiner recommended that the Company cease and desist therefrom; upon request, bargain with the Union, offer the striking employees reinstatement to their former or substantially equivalent positions with back pay from the date of the Company's refusal to reinstate them; and post appropriate notices (R. 50-55).

On June 28, 1946, the Board entered an order transferring the case to the Board, and, on the same date, a copy of said order and of the intermediate report were duly served upon the Company (R. 30, 56). The Company at no time thereafter filed any exceptions to the intermediate report as permitted by Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended (8 Fed. Reg. 16047, 16051, Section 202.33) then in effect.[1] On August 26, 1946, pursuant to the provisions of Section 35 of Article II of the Rules and Regulations of the Board (8 Fed. Reg. 16047, 16051, Sec-

---

[1] The pertinent provisions of Section 33 read as follows: "Within fifteen days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of this Article, any party or counsel for the Board may file with the Board at Washington, D. C., an original and four copies of a statement in writing setting forth such Exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. * * *

"No matter not included in a statement of Exceptions may thereafter be objected to before the Board, and failure to file a statement of Exceptions shall operate as a submission of the case to the Board on the record."

tion 202.35),[2] the Board issued its order adopting the findings, conclusions and recommended order set forth in the intermediate report (R. 31-33).

On February 9, 1949, the Board filed its petition for enforcement in the court below (R. 1-6) and thereafter filed a certified transcript of the record (R. 55-56). On April 18, 1949, the Board also filed in the court below its motion for the summary entry of a decree to enforce its order, alleging that in view of Section 33 of the Board's Rules, above mentioned, and of Section 10 (e) of the Act, as amended, which provides that no objection which has not been urged before the Board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances, the Company's failure to file exceptions to the trial examiner's findings and recommended order constituted a waiver of all objections to the order of the Board and that no contestable issue was before the court (R. 56-58). In response to the Board's petition, the Company, on April 18, 1949, filed a motion to remand the case to the Board for the purpose of adducing additional evidence to show that the

[2] Section 35 provides that: "Upon the expiration of the period for filing a statement of Exceptions and brief, as provided in Section 33 of this Article, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other agent or agency, or may close the case upon compliance with the recommendations of the Intermediate Report, or may make other disposition of the case.

Company had complied at least in part with the provisions of the Board's order of August 26, 1946; and that after bargaining with the Union, the parties had been unable to reach an agreement; that the Union has not bargained in good faith; and that the Union may not now represent a majority of its employees (R. 59-61).

The Board, on May 3, 1949, filed its opposition to the Company's motion to remand (R. 62-65). On May 13, 1949, the court below entered its order deferring action on the Board's motion for summary judgment and remanding the case to the Board with directions to take evidence and report (1) whether and to what extent the Company has complied with the Board's order; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises (R. 67).[3] On June 3, 1949, the Board filed its petition for rehearing (R. 67-73) which the court below denied on June 16, 1949 (R. 73).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In deferring action on the Board's motion for the summary entry of a decree upon the transcript of the record.

---

[3] The court below did not direct the Board to take evidence as to whether the Union had ceased to represent a majority of the Company's employees.

2. In remanding the case to the Board with directions to take evidence and report to it on questions concerning compliance with the Board's order.

3. In failing to grant the Board's motion for summary entry of a decree upon the transcript of the record.

ARGUMENT

The issues presented by this case are identical to those presented in *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, No. 434, this Term. About the only difference between the two cases is that here the trial examiner submitted his intermediate report and the Board entered its order before the enactment of the Labor Management Relations Act, 1947.[4] The last sentence of Section 10 (c) of the Act, as amended, which provides that an order recommended by a trial examiner shall automatically become the order of the Board unless excepted to within twenty days is not, therefore, applicable.

---

[4] Also, in this case but not in the *Mexia* case, the Company sought leave of the court below to adduce additional evidence to show that the Union had not bargained in good faith (*supra*, p. 6). If such evidence existed, it could show only that the Union had violated Section 8 (b) (3) of the Act, as amended, which makes it an unfair labor practice for a labor organization to refuse to bargain with an employer if it is the representative of his employees and the Company's remedy would have been to file an unfair labor practice charge with the Board against the Union. Such conduct on the part of the Union would, of course, be no defense to the Board's order requiring the Company, upon request, to bargain with the Union, and the court below properly did not direct the Board to take evidence on that issue.

But the inapplicability of this provision does not affect the Board's right to enforcement of its order. The Company did not except to the intermediate report or to the order recommended by the trial examiner, which the Board adopted. Having failed to object to the order before the Board, the Company was, under the provisions of Section 10 (e), both as originally enacted and as amended, precluded from challenging it before the court. *National Labor Relations Board* v. *Cheney California Lumber Company*, 327 U. S. 385, 388-389.

Moreover, the only issue of fact on which the court below, in remanding the case, directed the Board to take evidence was the question whether and to what extent the Company had complied with the order. As shown in our brief in the *Mexia Textile Mills* case, this issue is irrelevant in a proceeding to enforce a Board order and evidence relating thereto is not material within the meaning of the provision of Section 10 (e) authorizing the grant of leave to adduce additional evidence. The decision reached in the *Mexia* case will, we believe, govern the disposition of this case. Accordingly, we respectfully refer the Court to the reasons for reversing the order of the court below and directing the entry of a decree enforcing the Board's order which are set forth in our brief in that case.

CONCLUSION

For the reasons stated in our brief in the *Mexia* case, we respectfully submit that the order of the

court below should be reversed and the cause remanded with instructions to enter a decree enforcing the Board's order.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
MOZART G. RATNER,
Acting Assistant General Counsel,
ALBERT M. DREYER,
Attorney,
National Labor Relations Board.

APRIL, 1950.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

NO. 435

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

POOL MANUFACTURING COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING THE PETITION FOR WRIT OF CERTIORARI

SAMUELS, BROWN, HERMAN & SCOTT
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Fort Worth, Texas
Attorneys for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

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NO. 435

NATIONAL LABOR RELATIONS BOARD,
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VS.

POOL MANUFACTURING COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING THE PETITION FOR WRIT OF CERTIORARI

Respondent, Pool Manufacturing Company, pursuant to Rule 7, Paragraph 3, and in lieu of a motion to dismiss the petition for certiorari, asserts the following objections to the jurisdiction of this Court, and to the granting of the writ:

(a) The instant case does not involve matters of general public interest, or of public importance, but is admittedly shown to be brought before this Court

because of the Board's alleged dificulties in securing enforcement of its orders in the Fifth Circuit. This Court does not have jurisdiction to consider this case upon the ground that the Board desires that the Judges of the Fifth Circuit Court be reprimanded and brought into conformance with the Board's conception of its policy and duty, nor to cause the Fifth Circuit's ratio of decisions in favor of the Board to conform to the average of other Circuits.

(b) This Court is without jurisdiction under the law to act as monitor of the several United States Courts of Appeal and the petition for certiorari should be stricken and denied because of the improper action of counsel for Petitioner in using the petition as a vehicle for criticism of the Judges of the Fifth Circuit, coupled with counsel's action in releasing the contents of the petition to the newspapers for the sole and only purpose of intimidating and embarrassing the Judges of the Fifth Circuit.

(c) Petitioner did not give timely notice of its action in securing an extension of time for filing the petition for certiorari, and in the absence of such notice, this Court should view the judgment of the Fifth Circuit as final and decline jurisdiction because of the covert action of the Petitioner.

(d) The judgment of the Court below in granting Respondent's motion to take additional evidence under Section 10(e) of the applicable statute was proper.

ARGUMENT

I.

Grounds (a) and (c) that the case is not of public importance and jurisdiction does not lie to monitor the Fifth Circuit.

Respondent believes and will hereafter show that the order of the Fifth Circuit was proper under the applicable provisions of the statute governing this proceeding. But more important to the policy of this Court, and of concern to Respondent's counsel, is the effort to use certiorari as an intimidatory method of expressing the statistical pique of the National Labor Relations Board. When that admitted effort is coupled with a deliberate attempt to influence the action of this Court by newspaper publicity, dismissal of the petition and denial of the writ are appropriate.

Petitioner, under the law, occupies the same position before this Court as any suitor. It occupied a similar status before the Court below. In its administrative capacity, and in its role as prosecutor, the National Labor Relations Board, within the statute, has a justified administrative bias against all employers. In its capacity as litigant, however, the statute contemplates that it is a litigant and nothing more. Its representatives owe the respect to law and the judiciary due alike from all officers of the Court. Each particular case must stand or fall on its own merits. The Courts have not yet been made an auxiliary to the administrative function of the Executive Department of the Govern-

ment. Notwithstanding the statutory weight accorded the findings of the Board, its determinations of law and its rights as a party litigant are governed by principles binding alike upon it and the individual citizen in opposition. That is not the conception of the litigation presented by the petition for certiorari. The Board uses its administrative desire and policy as an end toward which the judicial process is to be directed whereas under our constitution, the judicial process is directed solely at equal justice, irrespective of whether the Board's conception of its policy is served or hindered.

Obviously, the petition for certiorari is bottomed upon facts wholly outside the record, particularly wherein the Board asserts the results of its litigation in other Circuits. Respondent has no knowledge of whether the Board's statements of fact in that regard are true, but Respondent is unwilling to have this Court act upon them on the assumption that the Board would not misrepresent them. We believe the effort to ground certiorari on facts outside the record is wholly improper in this instance, as it would be if any other litigant or lawyer asserted that injustice was done because his batting average in the Fifth Circuit was adverse.

It will be observed that in discussing the action of other Circuit Courts, the Board does not cite authorities or make an effort to show that the decisions of other Circuits are either right or wrong. It openly seeks review upon the ground that since the Fifth Circuit statistics are not as favorable as the question-

ed statistics from other Courts, that the Fifth Circuit is necessarily ignorant or determined to defeat the law.

II.

The instant case was correctly decided in the Court below.

This case does not involve a contention on the part of the Respondent, nor a judicial determination, to the effect that mere compliance with the order of the Board is sufficient of itself to prevent a judicial decree of enforcement. Respondent filed (Record P.59) a motion pursuant to Sec. 10(e) of the statute for leave to present additional evidence. (Appendix P. 9.) As grounds for the motion, Respondent alleged that the order sought to be enforced had been rendered on August 26, 1946, almost three years prior to the proceeding in the Court below. That following the order of the Board, Respondent accepted it and posted notices required by the Board. Respondent alleged that the union did not seek to bargain with Respondent until January of 1948, and that the parties met and exchanged proposals and counter proposals, but did not reach an agreement. Respondent's motion said that the circumstances concerning the bargaining relation had substantially changed since the entry of the Board, and that additional evidence should be taken for the Board "to determine whether the order entered almost three years ago should now be revised or set aside to determine the question of whether United Garment Workers . . . does in fact represent a majority of the employees within the unit, or whether the employees

desire to exercise their right to choose another bargaining agent, or to bargain for themselves." (R. 59)

The Respondent further set out under oath that the applicable statute under which the order was entered had been amended by the Labor Management Relations Act of 1947, and that under that Act the duty to bargain in good faith was now reciprocal. That the union had not bargained in good faith and had not endeavored to bargain with Respondent and that the change in circumstances of fact and law should now be considered by the Board for it to determine whether a different administrative order should be entered. Respondent's motion in part said "in that connection Respondent would show that the order of the Board and the enforcement order of the Court are prospective in nature, designed to establish a collective bargaining relation in the future, as distinguished from penalizing any party for acts and transactions which occurred more than four years ago." (Record P. 61). The order in the instant case is prospective, that is, it directs the Respondent to bargain in the future with the certified union. The whole purpose of the statute is to permit the administrative agency to shape its orders to the objective of good labor relations and collective bargaining. Granted that the Board is not to be in any sense penalized for failure to secure enforcement of its order promptly, nevertheless the Board itself is entitled and required under its administrative practice to afford the employees full freedom, and is entitled and does in administrative practice revise and shape its orders under such facts by ordering new elections, decertify-

ing bargaining agents or otherwise achieving the objectives of the statute. The order in question was predicated on labor relations far in the distant past. Respondent suggested material and relevant evidence to the establishing of sound statutory relations for the future, particularly relevant and material in a proceeding brought to secure future collective negotiations.

The authority on the question is NATIONAL LABOR RELATIONS BOARD V. INDIANA AND MICHIGAN ELECTRIC COMPANY, 318 US 9; 87 Law Ed. 579. In that case Mr. Justice Jackson held that an application of the type filed by Respondent in the instant case "was addressed to the sound judicial discretion of the Court"; that the question presented to the Supreme Court was whether the Court below had abused its discretion.

In the instant case we feel that no showing of abuse of discretion has been made or attempted. There is no claim that the facts alleged in Respondent's application to take additional evidence are not of concern to the Board nor any effort to show that the Board would not substantially reshape its order if in fact the parties have reached an impasse and, without interference by Respondent, the employees have withdrawn from the certified union. The ordinary course of the Board's procedure in such instances is to require fresh evidence that the ancient certification reflects a current majority, sometimes by ordering a new election, at other times by examining membership records. If in fact

(1) This court held in National Labor Relations Board v. Jones and Laughlin, 331 US 416; 91 Law Ed. 1575 & 1582 that remand to the Board for post order fact findings is proper.

another union represents a portion of the employees, it too has rights under the statute. All of these matters are relevant and material not only to the Respondent and employees in establishing a sound relation, but to the Board in following its accepted administrative policy.

CONCLUSION

WHEREFORE, Respondent, Pool Manufacturing Company, prays that the petition for certiorari be dismissed.

John M. Scott
1210 Electric Bldg.
Fort Worth, Texas
Counsel for Pool Manufacturing Company

Samuels, Brown, Herman, and Scott
Of Counsel

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer -

* * * * *

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Sec. 141, et seq.) are as follows:

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropri-

ate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript.* * *

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IN THE

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OCTOBER TERM, 1949

No. 435

NATIONAL LABOR RELATIONS BOARD,
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V.

POOL MANUFACTURING COMPANY
Respondent

BRIEF FOR POOL MANUFACTURING COMPANY

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Attorneys for Respondent

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1949

No. 435

NATIONAL LABOR RELATIONS BOARD,
Petitioner

V.

POOL MANUFACTURING COMPANY
Respondent

BRIEF FOR POOL MANUFACTURING COMPANY

STATEMENT

There is no issue as to the facts stated by Petitioner, except to point out that the order sought to be enforced related to bargaining which commenced on September 26, 1945, and terminated December 7, 1945. The certification under which the bargaining took place had been issued by the Board on December 17, 1943, (R. Page 43). The petition for enforcement of the order

was filed in the court below on February 17, 1949, (R. Page 1). Respondent's motion for leave to adduce additional evidence before the court is set forth in full at pages 59 through 61 of the record. For the convenience of the Court we reprint in the appendix to this brief the motion of the Respondent. This brief Page 6.

It is important to call to the Court's attention the fact that the order sought to be enforced was prospective in its nature directing the parties to bargain collectively in the future.

SUMMARY OF ARGUMENT

I.

The motion of Respondent to take additional evidence under Section 10(e) of the statute was addressed to the judicial discretion of the court, and the burden is on the Board to show that the order of the court below is arbitrary, unreasonable, or an abuse of discretion. This burden has not been sustained.

II.

The change in the substantive law defining the bargaining relation, the lapse of time since the entry of the order of the Board, and the fact that following the order of the Board, the Union and the Company had negotiated extensively without reaching an agreement, together with the fact that the developments since the order of the Board were unknown to the Board and might require the Board under its admin-

istrative policy to modify the order, sustained the discretion of the court below in directing an inquiry into the developments since the order of the Board.

ARGUMENT

Respondent's motion set out affirmatively that it had complied with the order of the Board; that all striking employees had returned to work and had been reinstated under collective bargaining procedures and that all differences between the Company and the Union relating to the return to work of the striking employees had been concluded by agreement. Respondent alleged that it had met with the Union following the order of the Board, but that no contract had been reached and that a representative of the certified union had advised Respondent that a substantial group of Respondent's employees were members of another union, Amalgamated Clothing Workers of America, CIO. The motion further presented that the Union had not bargained in good faith with the Respondent and that the change in the bargaining relation effected by the Labor Management Relations Act of 1947 should be taken into account by the Board to determine whether the order should be modified.

The motion did not present the fact of compliance by Respondent as a defense to the enforcement proceeding filed by the Board. Nor did the court below hold that compliance with an order of the Board was a defense to its judicial enforcement, and the court likewise did not refuse enforcement to the order of the Board in the instant case. In *National Labor Re-*

lations Board v. The Cooper Co., 179 Fed. 2d 241, the court below in commenting upon the instant case said:

> "Indeed, nothing was decided there (speaking of the Pool and Mexia cases). The Court, expressly deferring decision, merely referred the matter back to the Board for its assistance in furnishing further information and for its recommendations or requests in the light of such further information."

The bulk of Petitioner's brief is consumed with proving what is admitted in the case at bar.

Nor is there involved in the case at bar a denial by the court below of enforcement of the order of the Board. There is no frustration of the administrative wisdom and expertness of the Board. The attack made upon the court below in the petition for certiorari and the plaintive plea that the Board proceeding has become a merry-go-round are inappropriate to the unvarnished facts. Here as in most cases the facts and record are more important than generalities, and the actual situation in the court below must be viewed from its perspective to evaluate its order properly.

This case is a companion case to *No. 434, National Labor Relations Board v. Mexia Textile Mills, Inc.* The facts are closely parallel and the decision in the Mexia case is conceded by Respondent and Petitioner to govern the case at bar for the reasons set forth in Respondent's brief in the Mexia case.

Respondent prays the order of the court below be affirmed.

JOHN M. SCOTT
Attorney for Respondent

Of Counsel:
Samuels, Brown, Herman & Scott
1210 Electric Bldg.
Fort Worth, Texas

APPENDIX

In the United States Court of Appeals
For the Fifth Circuit

(File Endorsement Omitted)
(Title Omitted)

Reply to Motion of Petitioner for Summary Degree and Motion of Respondent for Leave to Take Additionel Evidence—Filed April 18, 1949

Now comes Pool Manufacturing Company, Respondent herein, replying to the motion of Petitioner, National Labor Relations Board, for summary decree and applies to the Court for leave to take additional evidence, and for grounds for such reply and for such leave would respectfully show:

1.

The complaint upon which the order of the Board was rendered resulted in a hearing before a trial examiner in April and May of the year 1946. The report of the trial examiner was issued June 25, 1946, and the order now sought to be enforced was rendered August 26, 1946.

2.

Following the rendition of the order, Respondent, Pool Manufacturing Company, notified the Regional Director of the National Labor Relations Board that

it accepted the order and complied with the requirements of the order of the National Labor Relations Board with respect to the affirmative actions, including the posting of notices. Substantially all of Respondent's employees who had been on strike prior to the hearing had returned to work before the order was rendered, and Respondent entered into collective bargaining with United Garment Workers of
94 America, AF of L, concerning the affirmative action required by the Board order so that all differences between the Respondent and the Union relating to the return to work by the striking employees were fully settled by collective bargaining. The United Garment Workers of America, AF of L, did not seek to bargain with Respondent on wages, hours and working conditions following the return to work of the striking employees in the summer of 1946 until January of 1948. At that time by letter dated January 26, 1948, United Garment Workers of America, AF of L, requested Respondent to open negotiations on a proposed union contract. Respondent accepted the invitation and by agreement with the Union a bargaining conference was held on February 13, 1948, and a second bargaining conference held on February 20, 1948. At these two conferences, which were recorded by a court reporter, proposals from the union were received and counter proposals from the Company to the Union were offered. The parties were unable to reach an agreement.

3.

Following the conference of February 20, 1948, the

Union has made no effort to bargain with the Respondent, although Respondent has at all times been ready, able and willing to bargain with the Union. Respondent is advised and believes and now in good faith questions, whether the union now represents a majority of the employees within the unit specified by the Board order. The Union organizer, Miss Emily Jordan, has advised Respondent's attorney that the Amalgamated Clothing Workers of America, CIO, have a substantial group of members in the plant of the Respondent. Individual employees of Respondent have stated that they do not now belong to United Garment Workers of America, AF of L, and do not desire that such union represent them in collective bargaining. Respondent is unable to bargain collectively with United Garment Workers of America, AF of L, under the circumstances and such bargaining will not effectuate the policies of the Act.

95 4.

Respondent would show that all the facts and circumstances set forth herein have occurred since the record in the instant case was closed and completed and that, therefore, Respondent could not offer such evidence before the Board at the time of the hearing. Respondent would show that the changed circumstances resulting from the facts and premises hereinabove set forth should be presented to the Board for its consideration to determine whether the order entered almost three years ago should now be revised or set aside to determine the question of whether United Garment Workers of America, AF of L, does in fact represent

a majority of the employees within the unit, or whether the employees desire to exercise their right to choose another bargaining agent, or to bargain for themselves.

5.

Respondent would further show that since the rendition of the order in this case by the National Labor Relations Board, Congress has enacted the Fair Labor Standards Act effective August 23, 1947. That pursuant to the provisions of said Act, the duty to bargain is reciprocal between Respondent and the bargaining agent, and that the bargaining agent, United Garment Workers of America, AF of L, has not bargained in good faith with Respondent and has not endeavored to bargain with Respondent and that this fact constitutes a change in circumstances which under the law now in effect should be considered by the Board to determine whether its order should remain in the form originally issued three years ago. In that connection Respondent would show that the order of the Board and the enforcement order of the Court are prospective in nature, designed to establish a collective bargaining relation in the future, as distinguished from penalizing any party for acts and transactions which occurred more than four years ago.

WHEREFORE, premises considered, Respondent, Pool Manufacturing Company, prays that the motion
96 of Petitioner, National Labor Relations Board, for a summary decree of enforcement be denied, and that this case be remanded to the Board with instruc-

tions for the taking of additional evidence pursuant to the provisions of Title 29, Section 160(e), USCA.

Respectfully submitted,

POOL MANUFACTURING COMPANY

By: SAMUELS, BROWN, HERMAN & SCOTT
1210 Electric Bldg.
Fort Worth, Texas
Attorneys for Respondent

Of Counsel:
JOHN M. SCOTT
John M. Scott

THE STATE OF TEXAS
COUNTY OF TARRANT

BEFORE ME, the undersigned authority, a Notary Public in and for Tarrant County, Texas, on this day personally appeared JOHN M. SCOTT, who after being by me duly sworn does on oath say that he is the attorney of record for Pool Manufacturing Company, a corporation; that upon information and belief, the facts set forth hereinabove are true and that the foregoing motion for leave to take additional evidence is filed in good faith and not for the purpose of delay, solely that justice may be done.

JOHN M. SCOTT

Subscribed and sworn to before me by the said JOHN M. SCOTT on this the 16 day of April, A. D. 1949.

OPAL CONDER
(SEAL) *Notary Public, Tarrant County, Texas*

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer-

* * * * *

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Sec. 141, et seq.) are as follows:

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropri-

ate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its members, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript.* * *.